Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

OCTOBER TERM, 1996

WILLIAM KUCHINSKAS, *et al.*, *Petitioners*,
v.
BROWARD COUNTY, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 94-4000

D. C. Docket NO. 91-6537-CV-UUB

WILLIAM KUCHINSKAS, ROBERTA HARTWELL,
on behalf of themselves and all other
present and former employees similarly
situated, et al.

Plaintiffs-Appellants,

versus

BROWARD COUNTY, a political subdivision
of the State of Florida,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(May 17, 1996)

Before TJOFLAT, Chief Judge, KRAVITCH and ANDERSON, Circuit Judges.

PER CURIAM:

Appellants are a class of Broward County, Florida, employees classified by the County as exempt from the minimum wage and overtime pay requirements of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219 (1994).[1] They allege that the County's policy of docking an employee for partial-day absences, by making a deduction either from the absent employee's pay or from the absent employee's leave bank, removed the appellant class from the FLSA exemption, and thus the class is owed back overtime pay and liquidated damages. After a two-day bench trial, the district court entered judgment in favor of the County. We affirm.

Since 1985, the FLSA has applied to public sector employees. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555-56, 105 S. Ct. 1005, 1020, 83 L. Ed. 2d 1016 (1985). The FLSA requires that covered, non-exempt employees receive a minimum wage and overtime pay for hours worked over forty hours per week. 29 U.S.C. §§ 206, 207. Some employees, however, are exempt from the FLSA's overtime provisions. Section 213 of the FLSA provides an exemption for all persons employed in a "bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1).

---

[1]Section 213(a)(1) of the FLSA provides that the minimum wage and maximum hour requirements of the FLSA "shall not apply with respect to . . . any employee employed in a bona fide executive, administrative, or professional capacity."

The regulations promulgated pursuant to the FLSA define an "employee employed in a bona fide executive, administrative, or professional capacity" as an employee with supervisory duties who is paid on a salary basis as opposed to an hourly wage. See 29 C.F.R. § 541.1(f) (1995); 29 C.F.R. § 541.117(a) (1995). To claim an exemption from the FLSA's requirements, an employer must prove that an employee meets two tests: the "job duties" test and the "salary basis" test. See 29 C.F.R. § 541.1(1)-(f); *Atlanta Professional Firefighters Union v. City of Atlanta*, 920 F.2d 800, 805 (11th Cir. 1991).

Appellants contend first that the County did not meet its burden of proof with respect to the "job duties" test. It is clear from the record, however, that appellants waived this issue prior to trial. The record reveals that all involved, including the court, believed that the only issue for trial was whether the County could meet the "salary basis" test.[2] Appellants cannot challenge

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[2]The appellants raised the County's failure to offer proof on the "job duties" test for the first time in a footnote in a memorandum in response to the County's supplemental memorandum challenging the constitutionality of the "salary basis" test as applied to public sector employers. Appellants did not mention the "job duties" test again until four months after trial and after final judgment had been entered for the County. During his opening statement at trial, the attorney for the County told the court that "[t]he [appellants] . . . meet the job duties test." Appellants did not object. Later during the trial, the County attorney objected to a question on cross-examination of a County witness, saying, "The [issue] here is, of course, salary basis, not duties test." The appellants did not challenge this statement or respond to the objection. In sum, neither the district court nor the County would have had

for the first time on appeal an issue they did not raise before the district court. *Allen v. Alabama*, 728 F.2d 1384, 1387 (11th Cir. 1984).

Appellants also contend that the County failed to meet its burden of proof under the "salary basis" test with respect to employees who had been docked for partial-day absences. We need not decide the issue, however, because even if the affected employees were not paid on a "salary basis," the County can benefit from the so-called "window of correction" contained in the regulations:

> [W]here a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

29 C.F.R. § 541.118(a)(6) (1995).

Appellant argues that this regulation should be read to require the deduction in all instances to be inadvertent; accordingly, since the deductions at issue were made pursuant to the express policy of the County and thus were not inadvertent, the "window of correction" does not apply. Unfortunately for the appellants, this court has decided that the plain meaning of the regulation is disjunctive; that is, the exemption is not lost when the deduction is "inadvertent" or "is made for reasons other than lack of work." *Lee v. Flightsafety*

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any reason to suspect, either before the trial or during the trial, that appellants were challenging the FLSA exemption on the basis of the "job duties" test.

Servs. Corp., 20 F.3d 428, 433 (11th Cir. 1994). Here, the deductions were made for partial-day absences, not for lack of work, and the county has reimbursed the affected employees.[3] The County therefore comes within the protection of the "window of correction" and does not lose the FLSA exemption with respect to those employees.

AFFIRMED.

---

[3]Since this lawsuit was filed, the Department of Labor has rewritten the salary basis portion of the "executive, administrative, or professional" exemption to make it clear that deductions for partial-day absences by public sector employers will not destroy the affected employee's FLSA exemption. See 29 C.F.R. § 541.5d (1995) (as added by 57 Fed. Reg. 37,666, 37,677 (1992)). Obviously, the County need not promise to comply with the out-of-date regulation.

APPENDIX B

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 94-4000

[DATED: 7/24/96]
D. C. Docket NO. 91-6537-CV-UUB

WILLIAM KUCHINSKAS, ROBERTA HARTWELL, on behalf of themselves and all other present and former employees similarly situated, et al.

Plaintiffs-Appellants,

versus

BROWARD COUNTY, a political subdivision of the State of Florida,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19___, _____F.2d _____).

Before: TJOFLAT, Chief Judge, KRAVITCH and ANDERSON, Circuit Judges.

PER CURIUM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/
Chief Judge, TJOFLAT

ORD-42
(6/95)

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 91-6537-CIV-UNGARO-BENAGES

WILLIAM KUCHINSKAS, et al.,

Plaintiffs,

vs.

BROWARD COUNTY, et al.,

Defendants.
_____/

THIS CAUSE was tried before the Court without a jury for two days, May 26th and 27th, 1993. The Court has carefully considered all of the testimony and exhibits offered by the parties at trial, the entire record herein, the proposed findings and conclusions and all memoranda of law submitted by the parties. Having done so, and being otherwise fully advised in the premises, the Court herewith renders this opinion containing Findings of Fact and Conclusions of Law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

Nature of the Case

This action was instituted by Plaintiffs William Kuchinskas and Roberta Hartwell pursuant to the Fair Labor Standards Act, as amended, 29 U.S.C. §201 *et seq.* ("FLSA"). In their Complaint, Plaintiffs allege that they and other present and former employees of Broward County ("County") are entitled to recover back overtime pay and liquidated damages because the County allegedly subjected them to a policy or

practice that required them to use accrued "leave compensation" and/or reduced their actual pay to cover partial-day absences. In accordance with the provisions of 29 U.S.C. §216(b), 115 other present and former County employees have opted-in to the Plaintiff class. All class members assert a claim for overtime pay and liquidated damages for a period of three years prior to the filing of this action to the present.

Findings of Fact

1. Defendant is a political subdivision of the State of Florida. (Stipulation "Stip.", Transcript "Tr.", p. 16).

2. For the purposes of the liability stage, Plaintiffs are current or former employees of the Defendant whose job duties are or were classified as "executive, administrative, and professional" ("EAP") employees, and whose salaries have exceeded $250 per week at all times relevant to this action. (Stip., p.17; Joint Motion for Bifurcation).

3. The FLSA exempts "executive, administrative and professional" ("EAP") employees who are paid on a "salary basis" from the FLSA's overtime and minimum wage requirements.

4. The County did not pay overtime to the Plaintiffs because the County believed them to be exempt from the minimum wage and overtime provisions of the FLSA.

5. Regardless of job classification, County employees receive, in addition to salary, certain benefits, such as, annual leave, sick leave, and administrative leave. Leave does accrue in accordance with formulas set forth in the Civil Service Rules and Regulations ("CSRR"). (Def. Ex. 45, 46, 47). Upon termination of employment or retirement, County employees are to be paid for all accrued and unused leave time. (Def. Ex. 45; Def. Ex. 46, §14.228(i); Tr. 199).

6. Prior to the County's September 11, 1991, clarification of its Civil Service Rules, the Rules did not differentiate between employees subject to the overtime provisions of the FLSA and the EAP employees who the County

considered exempt from the overtime provisions. (Tr. 196-97; Def. Ex. 46, CSRR Sept. 1990). The Rules classified "tardiness" as constituting an unexcused absence from work and penalized any tardy employee 15 minutes pay for every 15 minutes the employee was late. (Def. Ex. 46, 47). With respect to partial-day absences, the Rules simply stated that employees were required to reduce their leave banks in hourly increments for each hour they were not working. Partial-day absences occurred when an employee had a doctor's appointment during work hours, became sick during the workday, or wanted to take half of a vacation day.

7. As the CSRR did not specifically set forth a manner for dealing with partial-day absences of the EAP employees, various practices developed among the County's 58 different organizations units. (Defendant's Ex. 1, 11; Tr. 133, 147, 151, 154-55). One practice that was common throughout the organization was to expect exempt employees who were absent for part of a workday to "flex" their work schedule. This meant that if an exempt employee arrived an hour late for work, she would stay beyond 5:00 p.m. (Tr. 90, 153-56).

8. However if it was not possible for an employee to "flex" her schedule, or she simply chose not to, the employee could charge the hours missed to one of her accrued leave time "banks". (Stip., Tr. 18; Tr. 154-55). In this manner, charges to leave banks for partial-day absences were common among the County's EAP employees. (Tr. 112, 198).

9. County Personnel Director Philip Rosenberg and the heads of at least 36 of the County's 58 organization units never interpreted the County's personnel rules and regulations as requiring reductions in pay for partial-day absences by exempt employees. (Stip, p.117; Tr. 154). Accordingly no payroll deductions for partial-day absences were ever made in their departments. (Stip., p.117, Def. Ex. 61). Thus although partial-day deductions were theoretically possible throughout the County, only certain department heads imposed deductions for

partial-day absences, and only certain employees of the County suffered actual deductions.

10. Only 7 of the 117 Plaintiffs, and 73 of the more than 2,0000 [sic] EAP employees since 1988, had actual deductions from salary made for partial day absences. (Def. Ex. #60, Stip.; Tr. 17-18). However, these deductions were never made for lack of work, and no EAP employee was ever "docked" pay for a partial-day absence because he or she had exhausted all of their accrued leave time. (Stip., Tr. 17, 238-39; see also Tr. 90, 262, 264).

11. The County also required its entire workforce (including its highly-paid top administrators) to document their time worked on an hourly basis. (Def. Ex. 4-5). In most instances, the County's hourly reporting requirements were fulfilled through the daily completion of time sheets. (Def. Ex. 4-5). Because EAP employees were not believed to be eligible for overtime, many simply accounted for their "regular" 7 1/2 hour day while others recorded their actual time worked. (Stip., Tr. 27).

12. Many of the EAP employees also had set working hours and were required to complete leave request forms and have them approved in advance for each hour they wanted to take off. Approval of leave time was necessary so that, "insofar as practicable, the division or office can function without the hiring of additional, temporary help." (Def. Ex. 45, CSRR pre-1991 changes, §118.054; Def. Ex. 46, §14.228(d)). If an employee was absent from work and that absence was "not authorized by a specific grant of leave..., such an absence shall be without pay and shall be subject to disciplinary action." (Def. Ex. 45, §118.16; Def. Ex. 46, §14.239).

13. Some EAP employees were also required to "earn" job basis leave by working two hours overtime for every hour of leave, and the EAP employees' salaries were understood to be 2,080 hours a year. (T. 220; T. 218; Plaintiff's Ex. Tab. #3, #7-10, #14-28). Furthermore the EAP employees' pay stubs

indicated an hourly rate of pay; it was these hourly increments that were used to reduce the employees' accrued leave banks for partial day absences. (Pl. Ex. #11).

14. Many of the County's practices were typical among employers in the public sector where traditional principles of public accountability caused state and local governments to preclude payment for hours not worked and account separately for paid leave. (Tr. 148-50, 245-53; DOL Final Rule, 57 Fed. Reg. 37667 (1992).

15. Following the Supreme Court's 1985 decision in *Garcia v. San Antonio Metropolitan Transit Authority*, Broward County, with the assistance of outside labor counsel, initiated a comprehensive effort to review and revise its personnel policies and procedures to comply with the FLSA. (Tr. 93, 259 [Bugg depo. 30-36]; Def. Ex. 6, 7, 20). Continued compliance efforts were made in subsequent years.[1] (Tr. 105, 145-50; Def. Ex. 8-10, 21). However, reflecting the then-current understanding of the law, these efforts uncovered no payroll practices inconsistent with the Department of Labor (DOL) "salary basis" rule. (Tr. 93, 259 [Bugg depo. 30-36]; Def. Ex. 7, 13, p.6).

16. In 1990, the Ninth Circuit rejected long-standing public accountability principles in favor of a total prohibition on deductions for partial day absences. *Abshire v. County of Kern.* Although Rosenberg did not believe the County's existing

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[1]In 1989, the County hired Philip Rosenberg as Personnel Director. Rosenberg, an experienced public sector personnel specialist, was well-acquainted with the FLSA and implemented a "full-scale" review of County job classifications and a comprehensive examination of the County's payroll practices and procedures. (Tr. 150).

policies violated the FLSA, [2] he believed that due to *Abshire*, it would be in the County's best interest to clarify its published timekeeping policies. Therefore the County, with the assistance of new labor counsel, launched another full-scale review of its payroll practices. (Tr. 260, 97).

17. In order to ascertain existing policies and obtain suggestions for new procedures, Rosenberg initiated communications with several key County administrators, including Accounting Division Director Evan Lukic and Recording Division Manager William Kuchinskas. Soon after these communications, Kuchinskas, Lukic and other top managers filed a salary basis lawsuit against the County. (Tr. 161, 165; Defendant's Ex. 22). The lawsuit did not alter the County's existing FLSA compliance efforts. (Tr. 260).

18. The County revised its Civil Service Rules and related personnel policies in September of 1991. These revisions added a new policy which ensured that EAP personnel would not lose pay as a result of partial-day absences, even if they had exhausted their accrued leave time. (See 1991 CSRR, §14.39; Tr. 177, 183; Def. Ex. 23, 24, 26, 28). The County's personnel rules were also clarified to ensure that EAP employees were not financially penalized for tardiness. (Tr. 27). After ratification by the County Commission, the revised regulations were published and distributed, and County managers and payroll clerks were given specific compliance training. (Tr. 179; Def. Ex. 26, 27, 58).

19. At the same time that it clarified its personnel policies, the County also began a comprehensive audit to

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[2] "[P]ublic sector accountability was not inconsistent with the FLSA... [and] just because leave time or salaries were reflected in hourly increments... did not mean that [an EAP] should not be considered exempt from the FLSA." (Rosenberg Tr. 150).

determine whether any of its exempt employees had ever previously lost pay as a result of a partial-day absence. (Tr. 169). After a review of thousands of payroll transactions occurring since 1988, the County learned that 73 exempt employees (1.2% of the County workforce) had received a salary reduction due to a partial-day absence. These employees (including 7 Plaintiffs) were promptly repaid with interest their lost wages, which for the County's entire three-year payroll, totaled only $11,039.00. (Def. Ex. 32, 34, 35, 37; Tr. 184; Stip. p.17).

20. The County's audit did not take into account reductions to employee leave banks as a result of partial-day absences; thus employees were not credited for any deductions to leave banks. (Tr. 199-201). The audit also failed to consider whether retired or terminated employees suffered reductions in compensation upon their separation from the County due to debits to their leave banks on account of partial-day absences.

21. The County continued its FLSA compliance efforts after the revisions to the CSRR in 1991. (Tr. 180-182; Def. Ex. 28, 30). In February of 1992, the County further clarified its timekeeping policies to eliminate the need for EAP employees to complete daily time sheets. (Tr. 180-82; Def. Ex. 28, 30). In March 1992, after a California court questioned the legality of even charging leave banks of supposedly exempt employees for partial-day absences, the County completely suspended the practice. (P. Ex. 45; Tr. 180-82; Def. Ex. 31).

22. Although the County suspended these policies, the County continued to stress the importance of maintaining accountability for employee work and performance while balancing that need with the flexibility associated with the EAP employees. (Def. Ex. 28, 29).

23. In August of 1992, the DOL finalized its interim rule that allowed public sector employers to reduce their salary based employee's pay or leave bank for partial-day absences. 29

CFR §541.5d.[3]

24. After the DOL August 1992 rulemaking validated the County's pre-*Abshire* payroll procedures, the County again revised its policies to allow for partial-day pay practices consistent with its public accountability objectives. (Pl. Ex. 54).

Conclusions of Law

1. The Court has jurisdiction over this action pursuant to the United States Constitution, Art. III, §2, Cl.1 and 28 USC §1331.

2. The FLSA requires that covered, non-exempt employees receive minimum wage for all hours worked and overtime pay, at time and a half the regular rate of pay, for all hours worked over forty hours in a work week. 29 USC §207(a)(1).

3. Section 13(a)(1) provides a statutory exemption from these requirements to all employees employed in a "bona fide" executive, administrative, or professional capacity. 29 USC §213(a)(1).

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[3]The Court will not apply the "public employee" exception of 29 C.F.R. §541.5d retroactively as suggested by Broward County. "The Secretary withdrew a proposed regulation that would have given the exemption retroactive effect. 57 Fed. Reg. 37678 (Aug. 19, 1992). We agree with the Secretary that the rule would have been invalid because the FLSA does not authorize retroactive rulemaking. *See, generally, Bowen* v. *Georgetown University Hospital*, 488 U.S. 204, 208 (1988) (' ... a statutory grant of legislative rulemaking authority will not ... be understood to encompass the power to promulgate retroactive rules unless the power is conveyed by Congress in express terms.')" *Michigan Assoc. Of Government Employees v. Michigan Dept. Of Corrections*, 1 WH Cas. (BNA) 574, 575 (6th Cir. 1993).

4. Congress however failed to define "bona fide executive" in the FLSA, choosing instead to delegate that responsibility to the Secretary of Labor. 29 U.S.C. §213(a)(1). The regulations define "bona fide executives" as employees with supervisory duties who are paid on a salary basis as opposed to an hourly wage. 29 CFR 541.1(f); 29 CFR §541.117(a). Generally, in order to claim an exemption, an employer must prove that the employee meets both the "duties test" and the "salary test". *See Abshire v. County of Kern*, 908 F.2d 483, 484 (9th Cir. 1990) *cert. denied*, 111 S.Ct. 785, *rehearing denied*, 111 S.Ct. 1341 (1991); *Atlanta Professional Firefighters Union v. Atlanta*, 920 F.2d 800, 805 (11th Cir. 1991) ("the 'short test' requires that an employee be paid on a 'salary basis' and have a 'primary duty' as an administrator").

5. Thus an employee whose terms and conditions of employment meet the stated exemption requirements need not be paid overtime premium pay for hours worked over 40 hours per week. However, the employer bears the burden of showing that the exemption applies to employees, *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974), and the exemptions are to be narrowly construed in order to further Congress's goal of providing broad federal employment protection. *Mitchell v. Lublin, McGaughy & Associates*, 358 U.S. 207, 211 (1959).

6. An employee will be considered to be paid "on a salary basis" if the employee regularly receives "a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed" regardless of the actual number of hours worked. 29 CFR §541.118(a). The regulation does not define the term "compensation" and does not otherwise provide any guidance with respect to whether "compensation" includes benefits such as administrative and sick

leave.[4]

7. As for deductions, the regulations state that they may not be made "for absences occasioned by the employer or by the operating requirements of the business," such as "deductions... for time when work is not available." §541.118(a)(1). Deductions may however be made from an employee's predetermined compensation without invalidating the employee's salaried status when an employee is absent from work for one full day or more for personal reasons, sickness, or disability as long as the deduction is made according to a plan, policy, or practice. §541.118(a)(2), (3). Likewise, deductions imposed "in good faith for infractions of safety rules of major significance" also will not affect an employee's salaried status. §541.118(a)(5).

8. The regulations do not describe other employment practices that might affect an employee's classification, but instead state that the effect on the salaried status of an employee when an impermissible deduction is made will depend on the facts of each case.

History

9. In 1974, Congress extended coverage under the FLSA to all public sector employees.[5] However in 1976 the

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[4]The Court disagrees with Defendant's argument that 29 CFR §541.118 is unconstitutional as applied to state and local government employers. Rather the Court finds that §541.118 does not violate the Tenth Amendment as it does not impair the state's ability to function effectively in the federal system and thus is not inconsistent with the Constitution's allocation of power between the federal and state governments.

[5]As originally enacted, the FLSA excluded public sector employees.

Supreme Court held that the FLSA's minimum wage and overtime pay provisions could not be constitutionally applied to State and local government employees engaged in traditional governmental activities. *National League of Cities v. Usery*, 426 U.S. 833 (1976); *See also* 57 Fed. Reg. 37666 (1992).

10. In 1985, nine years later, the Supreme Court reversed *National League of Cities* and held that the FLSA was applicable to State and local governments under the Commerce Clause of the Constitution. *Garcia v. San Antonio v. Metropolitan Transit Authority*, 469 U.S. 528 (1985). In November of 1985, in response to *Garcia*, Congress amended the FLSA to include State and local governments and provided employers with a one-year grace period in which to comply with the newly amended FLSA.

11. The 1985 Amendments did not however affect section 13(a)(1) of the Act or specifically address the application of the executive, administrative, or professional employee exemption to State and local government employees. *See* 57 Fed. Reg.. At 37667. In fact, neither the statutory changes nor the legislative history of the 1985 Amendments contain any significant references to section 13(a)(1) or 29 CFR part 541.

12. At the time of *Garcia* and the subsequent amendments to the FLSA, State and local governments had regulations and policies that had evolved and been in place for years. 57 Fed. Reg. at 37667. The State and local government's pay systems that had evolved were "generally premised on a concept derived from principles of public accountability that governmental employees should not be paid for time not worked due to the need to be accountable to the taxpayers for the expenditure of public funds." Id. "Public accountability is a broad concept that forms the foundation for many governmental administrative practices, including most public sector pay systems, and... embodies the concept that elected officials and public agencies are held to a higher level of responsibility under the public trust that demands effective and

efficient use of public funds in order to serve the public interest. It includes the notion that the use of public funds should always be in the public interest and not for individual or private gain." Id. at 37676. Thus at the time of *Garcia*, most public employers had compensation systems in place which required all employees, regardless of pay, to use accrued leave time or incur a reduction of pay for any absences from work. Id. at 37667.

13. As a result of the strong governmental interest in public accountability and the failure of the FLSA and DOL to address public employment specifically, public employers became uncertain whether their payroll practices, including payroll systems which prohibited otherwise exempt employees from being paid for absences of less than a day, were in compliance with the FLSA. *Id.*

14. Although the DOL recognized the potential conflict between the FLSA and the concept of public accountability, it failed to revise the salary regulations as they applied to public employers and, instead, on January 9, 1987, the DOL adopted a nonenforcement policy which allowed public employers to make deductions for partial day absences without destroying an exempt employee's status. *Id.* at 37668. The policy however was applicable only where a State or local law existed, and was in effect prior to April 15, 1986, which prohibited payments to an employee for hours not worked. *Id.* Thus if a public employer could show that a provision of a State or local law was in effect prior to April 15, 1986, deductions made for partial day absences would not affect a public employee's exempt status.

15. Neither *Garcia* nor the 1985 amendments to the FLSA expressly stated whether a partial-day absence would negate a bona fide executive's "salary based" status. Rather the regulations state that a salary based employee must regularly receive "a predetermined amount constituting all or part of his compensation" and that deductions may be made for absences of a full day or longer. 29 CFR §541.118. Since the Supreme

Court's decision in *Garcia*, there have been numerous lawsuits filed by public employees to recover overtime pay. "[I]n many of these cases the resolution of the exempt status of employees turned solely on the court's reading of the 'salary basis' requirements in the regulations." 57 Fed. Reg. at 37668. The courts have interpreted the regulations in different ways thus reaching different results as to whether deductions for partial-absences would in fact destroy an employee's "salary based" exemption.

Actual v. Theoretical Deductions

16. In 1990, the Ninth Circuit held that the "salary basis" test was not met when a public employee's compensation was "subject to" deductions for absences of less than one day even if no such deductions had occurred. *Abshire*, 908 F.2d 483. "Section 541.118(a) does not require that a deduction for an absence of less than a day actually have been made, but only that an employee's pay be 'subject to' such a deduction." *Id.* at 487. According to *Abshire* whether or not a deduction has ever been made is an "irrelevant" question. "A salaried employee is compensated not for the amount of time spent on the job, but rather for the general value of services performed." *Id.* at 486. *See also Martin v. Malcome Pirnie, Inc.*, 949 F.2d 611, 615 (2nd Cir. 1991) *cert. denied* 113 S.Ct. 298 (1992); *Banks v. City of North Little Rock*, 708 F.Supp. 1023 (E.D. Ark. 1988); *D'Camera v. District of Columbia*, 693 F.Supp. 1208 (D.D.C. 1988); *Harrison v. District of Columbia*, 30 WH Cas. (BNA) 557 (D.D.C. 1991).

17. The *Abshire* decision and the cases that followed it caused confusion and exposed governmental employers to potentially enormous and generally unexpected back wage liabilities for many employees who would be clearly exempt but for the treatment of leave and the docking of pay for partial-day absences.

18. However not all courts followed the Ninth Circuit's reasoning in *Abshire*. Some courts held that a salary

is not "subject to" deduction in the absence of evidence that an employee's pay was ever reduced. Thus only actual and not "theoretical" deductions could invalidate the salary basis of compensation. In *Atlanta Professional Firefighters,* the Eleventh Circuit held that the captains' pay was not subject to reductions because of quality or quantity of work as there was no evidence that any caption ever suffered an actual reduction in pay. 920 F.2d at 805; *See also Harris v. District of Columbia,* 709 F.Supp. 238, 241 (D.D.C. 1989) (Even though defendant conceded that under its certain circumstance, the court concluded that the plaintiff was not eligible for the exemption because "no deduction ha[d] actually been made."); *DC Nurses v. District of Columbia,* 29 WH Cas. (BNA) 868 (D.D.C. 1988).

19. This Court is bound to following the binding precedent in this Circuit that only actual and not "theoretical" deductions can invalidate an EAP employee's salary basis exemption. *See Atlanta Professional Firefighters,* 920 F.2d at 805. Therefore Broward County is liable, if at all, only to those Plaintiffs who have suffered actual reductions in pay for partial-day absences.

20. Although some courts have also found that reducing leave banks for partial-day absences is contrary to an EAP employee's salaried status, this Court disagrees with that position. "Under 29 CFR §541.118(b), an employee is considered salaried when he regularly receives a predetermined amount constituting all or part of his compensation. While personal leave, sick leave and/or compensatory time may be part of an employee's compensation package, it does not constitute salary." *International Association of Fire Fighters, Alexandria Local 2141, et al. v. City of Alexandria, Va.,* 720 F.Supp. 1230 (E.D. Va. 1989) *aff'd* 912 F.2d 413 (4th Cir. 1990). Moreover on July 17, 1987, in a letter ruling interpreting agency regulations, the Department of Labor stated that while deductions in salary are not permitted for absences of less than

a day, an employer may require an employee to substitute paid leave for such absences without losing their exemption. *See* Administrative Letter Rulings: Department of Labor, Wage and Hour Division, July 17, 1987. Thus the Court finds that leave banks do not constitute salary, and any reduction to leave banks would not negate an exempt employee's status. *Compare SEIU v. County of San Diego,* 784 F.Supp. 1503, 1504 (S.D. Cal. 1992) ("The docking of an employee's leave time for absences from work is as contrary to the notion of salaried status as the docking of base pay.... Such a reduction is entirely inconsistent with salaried status."); *Abshire,* 908 F.2d at 487 n.3 (The Court commented that requiring employees to take leave time for absences of less than a day might be indicative of non-salaried status, but avoided the question.).

21. Additionally Plaintiffs allege that the County implemented other policies that were inconsistent with an exempt employee's salaried status. These policies are as follows: the County required all employees, including exempt employees, to account for their time by keeping time sheets; some exempt employees were required to complete leave request forms and have them approved in advance for each hour they want to take off; and others were required to earn job basis leave by working two hours overtime for every hour of leave; lastly the employees' salary was understood as 2,080 hours annually.

22. In the Court's view, however, these policies are "premised on the concept of public accountability- that governmental employees should not be paid for time not worked, and that there is a need to be accountable to the taxpayers for the expenditure of public funds." 56 Fed. Reg.. 45824, 45825 (1991). The concept of public accountability is not inconsistent with the FLSA. Thus, the policies employed by the County do not negate Plaintiffs' status as "salary based" employees and make them hourly employees eligible for overtime pay pursuant to the FSLA.

"Window of Correction"

23. While the County's deductions did, at the time, constitute an FLSA violation, the Court has further concluded that the Defendant remedied the violation through application of the DOL's so-called "window of correction." 29 C.F.R. §541.118(a)(6). In pertinent part this section of the "salary basis" regulation states as follows:

> [W]here a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deductions and promises to comply in the future.

24. Applying this rule, an employer who improperly makes partial-day deductions may "restore" the affected employees' FLSA exemption by reimbursing the employees their lost wages and promising to comply with the salary basis regulation in the future. *Simmons v. City of Fort Worth, Tex.*, 805 F. Supp. 419, 424 (N.D. Tex. 1992); *Keller v. City of Columbus, Ind.*, 778 F. Supp. 1480, 1486 (S.D. Ind. 1991); *Hartman v. Arlington County, Ca.*, 720 F. Supp. 1227, 1230; (E.D. Va. 1989); *aff'd* 903 F.2d 290 (4th Cir. 1990; *International Ass'n of Firefighters, Alexandria Local 2141*, 720 F. Supp. at 1232. If the "window of correction" applies, "then it is as if the employees' salaries were never 'subject to reduction.'" *Keller*, 778 F. Supp. at 1487.

25. Plaintiffs allege that the "window of correction" is inapplicable to the case at bar as the County had a settled policy and wide-spread practice of making reductions to EAP employees' salaries and leave banks for partial-day absences. Therefore, according to Plaintiffs, the County's policy could not be classified as "inadvertent" or the result of any "mistake," and thus the "window of correction" is not applicable.

26. Assuming Plaintiffs are correct that the County had a "settled policy," the Court nonetheless disagrees with the

Plaintiffs' position that the "window of correction" is necessarily inapplicable in this case. The "window of correction" has been applied in cases where partial day deductions were made by the employer pursuant to an established written policy. *Hartman*, 720 F. Supp. 1229-30, *Thomas v. County of Fairfax*, 758 F. Supp. 353, 357 n.8 (E.D. Va. 1991), and when the reimbursement did not occur until after plaintiffs had brought suit. *Keller*, 778 F. Supp. at 1487 ("[I]t is irrelevant that the lawsuit brought the errant policy to the City's attention."); *Harkins v. Chesapeake*, 29 WH Cas. (BNA) 1399, 1400 (E.D. Va. 1988). Moreover courts have held that the "window of correction" is available to employers despite longstanding policies of making deductions from EAP employees' pay. "By its own terms, that section [29 CFR §541.118(a)(6)] contains no time limit within which an employer must correct a deduction." *Keller*, 778 F. Supp. at 1487 (City properly utilized window of correction to preserve exempt status after the lawsuit commenced despite three-year policy of making unauthorized deductions); *See also Simmons*, 805 F. Supp. 424-25 ("Window of correction" applicable although city-wide policy in effect over four years and resulting in over 20% of the City's exempt employees suffering improper deductions); *Hartman*, 720 F. Supp. at 1230 (two years and ten months).

27. The regulation provides that the "window of correction" option applies when a deduction is "inadvertent, or is made for reasons other than lack of work." 29 CFR §541.118(a)(6) (emphasis added). In the Court's view the window of correction can be applied in this case, regardless of whether the County had a "settled policy," provided the deductions for partial day absences were "inadvertent" or due to "reasons other than lack of work."

28. Certain courts have read the "window of correction" conjunctively, requiring the deduction to be inadvertent and for reasons other than lack of work. *See Abshire*, 908 F.2d at 489 (The window "only applies to an

employer that makes a one-time improper deduction and then corrects its error."); *Malcolm Pirnie*, 949 F.2d at 616. However such a "narrow interpretation of the window of correction in §541.118(a)(6) is not supported by the language of the regulation itself." *Simmons*, 805 F. Supp. at 425. "As the regulation's text and previous cases have shown, the 'window of correction' applies rather broadly; employers will not be penalized for technical errors that do not go to the substance of the relationship." *Keller*, 778 F. Supp. at 1487. Thus if deductions were made "for reasons other than lack of work" then the "window of correction" is applicable regardless of whether the error was inadvertent. *Id. See also Martin v. W.E. Monks & Co.*, 1993 WL 300332, p.4 (6th Cir. 1993) (The 6th Circuit affirmed the district court's ruling that the "window of correction" was unavailable to the defendants, but held that the district court "misinterpret[ed] the requirements for the applicability of the 'window of correction' by construing inadvertence as a requirement of §541.118(a)(6).")

29. This Court agrees that the phrase "inadvertent, or made for reasons other than lack of work" should be read disjunctively. The record in this case is undisputed that the County never reduced any of the Plaintiffs' salaries for reasons other than lack of work and that the County has reimbursed the affected employees for the deductions with interest. The County has further demonstrated that it took all reasonable steps to ensure that the practice was discontinued and did not recur. Therefore the County is entitled to the benefit of the "window of correction" to insulate it from further liability to the affected Plaintiffs.[6]

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[6]The Court also believes a strong argument can be made that the County's policy was inadvertent due to the uncertainty and confusion in the law. However, the basis for the Court's conclusion that the window of correction applies

30. Moreover the Court finds the "granting of windfall awards of across-the-board retroactive overtime payments to public employees who never had any actual deductions made in their salaries, along with employees who rarely had such deductions, but all of whom would be entitled to substantial back pay under *Abshire* simply because their salaries were theoretically 'subject to' the possibility of docking" to be fundamentally unfair and inequitable. 57 Fed. Reg. at 37669 (discussing State and local government concerns of potential liabilities after *Abshire).*

31. Thus the Court finds that the County has corrected any previous violations of the FLSA by taking curative steps in expressly amending its personnel policies and reimbursing the affected employees for partial-day deductions. Moreover there has been no evidence presented that the deductions made by Defendant Broward County from EAP employees were made for lack of work. Although the window of correction regulation need not be read conjunctively, the Court finds that the County has satisfied both parts of the regulation as the deductions were both inadvertent and made for reasons other than lack of work. Thus the Plaintiffs have no claim for further relief.

32. In light of the foregoing, judgment shall be entered in favor of the Defendant Broward County. The Defendant shall submit a proposed form of judgment prepared in accordance with these findings and conclusions within ten (10) days from the date of this Order.

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is stated in paragraph #29.

DONE AND ORDERED in Chambers at Miami, Florida, this 7th day of September, 1993.

/s/
URSULA UNGARO-BENAGES
UNITED STATES DISTRICT JUDGE

copies provided:

John Scarola, Esq.
Brenda J. Carter, Esq.
Michael G. Whelan, Esq.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO.: 91-6537-CIV-UNGARO-BENAGES
MAGISTRATE BARRY S. SELTZER

WILLIAM KUCHINSKAS,
ROBERTA HARTWELL, on behalf
of themselves and all other
present and former employees
similarly situated,

Plaintiffs,

vs.

BROWARD COUNTY, a political
subdivision of the State of Florida

Defendant. /

FINAL JUDGMENT

THIS CAUSE came before the Court for a non-jury trial, the Honorable Ursula Ungaro-Benages, District Judge, presiding. The issues have been duly tried, and the Court having rendered its Order containing Findings of Fact and Conclusions of Law on September 7, 1993, it is hereby

ORDERED AND ADJUDGED that **FINAL JUDGMENT** on the merits is hereby **ENTERED** in this case

in favor of the Defendant and against the Plaintiffs, with the Plaintiffs to take nothing by their Complaint. The Defendant, shall recover its costs from Plaintiffs, in an amount to be set by the Court upon the filing of a motion to tax costs by the Defendant. **DONE AND ORDERED** in Chambers at Miami, Florida, this 20th day of September, 1993.

/s/
URSULA UNGARO-BENAGES
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

copies provided:

John Scarola, Esquire
Brenda J. Carter, Esquire
Michael G. Whelan, Esquire
John J. Copelan, Esquire

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO.: 91-6537-CIV-UNGARO-BENAGES
MAGISTRATE BARRY S. SELTZER

WILLIAM KUCHINSKAS,
ROBERTA HARTWELL, on behalf
of themselves and all other
present and former employees
similarly situated,

Plaintiffs,

vs. **OMNIBUS ORDER**

BROWARD COUNTY, a political
subdivision of the State of Florida

Defendant.
_____/

THIS CAUSE came before the Court upon the following:

1. Defendant's Motion for Leave to Amend Answer, Affirmative Defenses, and Pretrial Stipulation. (D.E. #108).

THE COURT has considered the Motion, responses and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED as follows:

1. Defendant's Motion for Leave to Amend is GRANTED.

3. Defendant is further ordered to brief the issue of the constitutionality of the salary basis provisions of the Fair Labor Standards Act as applied to Defendant, a public employer, on or before March 17, 1993. Plaintiffs, if they so desire, must respond by March 23, 1993. The expedited briefing schedule is necessary because of the trial date.

DONE AND ORDERED in Chambers at Miami, Florida, this 10th day of March, 1993.

/s/
URSULA UNGARO-BENAGES
UNITED STATES DISTRICT JUDGE

copies provided:

John Scarola, Esq.
Brenda J. Carter, Esq.
Michael G. Whelan, Esq.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION
CASE NO.: 91-6537-CIV-UNGARO-BENAGES
MAGISTRATE BARRY S. SELTZER

WILLIAM KUCHINSKAS, et al.
Plaintiffs

ORDER

vs.

BROWARD COUNTY, et al.,

Defendants.
_____/

THIS CAUSE is before the Court upon Plaintiffs' Objections to Defendant's Proposed Final Judgment [D.E. 189].

THE COURT has reviewed the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ADJUDGED that the Motion is DENIED as MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 27th day of September, 1993.

/s/
URSULA UNGARO-BENAGES
UNITED STATES DISTRICT JUDGE

copies provided:
John Scarola, Esq.
Brenda J. Carter, Esq.
Michael G. Whelan, Esq.

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO.: 91-6537-CIV-UNGARO-BENAGES
MAGISTRATE BARRY S. SELTZER

WILLIAM KUCHINSKAS,
et al.,

Plaintiffs

vs.

OMNIBUS ORDER

BROWARD COUNTY, a political
subdivision of the State of Florida

Defendant.
_____/

THIS CAUSE came before the Court upon the following:

1. Plaintiffs' Motion for Clarification and Supplement thereto [D.E. 207, 214].
2. Plaintiffs' Motion for Reconsideration [D.E. 206].
3. Defendant's Verified Motion to Tax Costs [D.E. 194].
4. Plaintiffs' Motion for Sanctions [D.E. 205].
5. Defendant's Cross-Motion for Sanctions [D.E. 208].

THE COURT has considered the Motions, responses and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED as follows:

1. Plaintiffs' Motion for Clarification and Supplement thereto [D.E. 207, 214] is hereby DENIED.

2. Plaintiffs' Motion for Reconsideration [D.E. 206] is hereby GRANTED. In its Final Judgment, the Court ordered that Defendant would recover costs from Plaintiffs. In awarding costs, the Court relied upon Fed.R.Civ.P. 54(d) which allows costs to the prevailing party in the absence of an express statutory provision therefor. As 29 U.S.C. § 216(b) expressly provides for the awarding of costs to the prevailing plaintiff only, the Court's Order denying Plaintiff's Motion to Amend or Alter Judgment is hereby VACATED and the Court's Final Judgment is hereby VACATED to the extent it awarded costs to the Defendant. All other aspects of the Final Judgment remain in full force and effect. Plaintiffs' Motion for New Trial is hereby DENIED.

3. Defendant's Verified Motion to Tax Costs [D.E. 194] is hereby DENIED.

4. Plaintiffs' Motion for Sanctions [D.E. 205] is hereby DENIED.

5. Defendant's Cross-Motion for Sanctions [D.E. 208] is hereby DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 18th day of January, 1994.

/s/
URSULA UNGARO-BENAGES
UNITED STATES DISTRICT JUDGE

copies provided:
counsel of record

APPENDIX F

Relevant Docket Entries

7/16/91	1	NOTICE OF REMOVAL from Seventeenth Judicial Circuit Court, Broward County, Florida A-7 (cg) [Entry date 07/19/91]
7/16/91	2	CERTIFICATE OF SERVICE from Broward County (cg) [Entry date 07/19/91]
7/16/91	3	NOTICE of filing Notice of Removal by Broward County (cg) [Entry date 07/19/91]

* * * *

7/30/91	5	ANSWER to Complaint by Broward County (cg) [Entry dated 07/31/91]
2/22/93	108	MOTION with memorandum in support by Broward County for leave to file amended answer, affirmative defenses and pretrial stipulation (cp) [Entry date 02/24/93]

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3/10/93	123	ORDER granting [108-1] motion for leave to file

amended answer, affirmative defenses and pretrial stipulation, denying [107-1] motion to intervene, denying [107-1] motion for joinder as party plaintiffs (signed by Judge Ursula Ungaro-Benages on 3/8/93) CCAP (cp) [Entry date 03/15/93]

9/9/93 186 ORDER That judgment shall be entered in favor of defendant Broward County. Defendant to submit proposed judgment within 10 days of date of Order (signed by Judge Ursula Ungaro-Benages on 9/7/93) CCAP (cp) [Entry date 09/13/93]

9/16/93 187 NOTICE of filing proposed final judgment by Broward County (vr) [Entry date 09/17/93]

9/21/93 188 JUDGMENT for Broward County against William Kuchinskas and Roberta Hartwell Plaintiffs take nothing, Defendant recovers costs, amount to be set by the Court (signed by Judge Ursula Ungaro-Benages on 9/20/93) CCAP/M (vr) [Entry date 09/23/93]

9/22/93 189 OBJECTIONS by William Kuchinskas and Roberta Hartwell to proposed final

judgment (vr) [Entry date 09/23/93]

9/28/93 190 ORDER mooting [189-1] opposition response (signed by Judge Ursula Ungaro-Benages on 9/27/93) CCAP (vr) [Entry date 9/30/93]

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1/18/94 218 Omnibus ORDER denying [214-1] supplemental motion for clarification of clarification of [203-1] Order, denying [208-1] cross motion for sanctions, denying [205-1] motion for sanctions, mooting [204-1] motion for hearing on motion for sanctions denying [207-1] motion for clarification of [203-1] order, granting [206-1] motion for reconsideration of [203-1] order, denying [194-1] motion to tax costs, vacating [188-1] judgment order to the extent it awarded costs to defendants Denying plaintiffs' motion for new trial (signed by Ursula Ungaro-Benages on 1/18/94) CCAP (cp) [Entry date 01/20/94]

APPENDIX G

IN THE CIRCUIT COURT OF
THE SEVENTEENTH
JUDICIAL CIRCUIT IN AND
FOR BROWARD COUNTY

CIVIL DIVISION

CASE NO.: 91018049
June 18, 1991

WILLIAM KUCHINSKAS,
ROBERTA HARTWELL, on
behalf of themselves and all other
present and former employees
similarly situated,

Plaintiffs,

vs.

BROWARD COUNTY, a political
subdivision of the State of Florida

Defendant.
_____/

COMPLAINT

1. Plaintiffs, William KUCHINSKAS and Roberta HARTWELL, on behalf of themselves and all other "job basis" employees of the Broward County Board of County Commissioners, sue the Defendant, Broward County (the "County"), for unpaid overtime compensation estimated at an amount in excess of $15,000,000, plus an equal amount in liquidated damages, attorney fees, and costs, under the

provisions of Section 16 (b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. § 216 (b)).

2. Plaintiffs and other "job basis" employees similarly situated have suffered, and continue to suffer, under the Broward County Board of County Commissioners' policy and practice that is in flagrant and willful contravention of the Federal Fair Labor Standards Act, related regulations of the U.S. Department of Labor, and established case law. The County's policy and practice requires that "job basis" employees:

(a) work extensive overtime hours;

(b) work this overtime without pay; and yet,

(c) have their pay subject to reductions for absences of part of a day, just as the pay of hourly employees is subject to reductions for absences of part of a day.

JURISDICTION

3. Jurisdiction over this action is conferred on this Court by Section 16 (b) of the Act (29 U.S.C. § 216 (b)).

PARTIES

4. Within the period of three years prior to the filing of this Complaint, Plaintiffs are, or were, employed in the State of Florida in various job classifications designated as "job basis," by their employer The Broward County Board of County Commissioners (County). Plaintiffs bring this action on their own behalf and, pursuant to 29 U.S.C. § 216 (b), on behalf of all other present, and former, "job basis" employees of the County, similarly situated.

5. Defendant, Broward County, is a political subdivision of the State of Florida, and is located within the territorial jurisdiction of this Court. At the times alleged in this complaint, Defendant Broward County, more particularly The Broward County Board of County Commissioners, employed Plaintiffs, and other "job basis" employees similarly situated.

6. Defendant Broward County is, and was, at all times mentioned in this Complaint, a public agency and an employer within the meaning of Section 3(d) of the Act (29 U.S.C. § 203 (d)). Defendant Broward County is, and was, at all times mentioned in this Complaint, engaged in activities that are enterprises for business purposes within the meaning of Section 3(r) of the Act (29 U.S.C. § 203 (r)) and in commerce within the meaning of Section 3 (s) of the Act (29 U.S.C. § 203(s)).

7. During the period commencing August 15, 1986, and continuing to the present time, Broward County, more particularly the Broward County Board of County Commissioners, employed Plaintiffs, and other "job basis" employees similarly situated, who were engaged in commerce as described in the preceding paragraph.

8. On numerous occasions since August 15, 1986, and continuing to the present, Plaintiffs and other "job basis" employees similarly situated, were repeatedly required to work in excess of 40 hours per week by their employer, The Broward County Board of County Commissioners.

9. Plaintiffs, and other "job basis" employees similarly situated, were not paid by Broward County for these overtime hours because it arbitrarily classified these employees as "job basis" employees exempt from overtime compensation.

10. During the time that these Plaintiffs, and other "job basis" employees similarly situated, were not paid overtime by the County, it was the County's policy and practice to require that their pay, like the pay of hourly employees, be subject to reductions, in hourly increments, for absences of part of a day. Just as all hourly County employees, such partial-day absences had to be deducted from the accrued sick leave, annual leave, or other leave earned by Plaintiffs, and other "job basis" employees similarly situated. It was, and is, the County's policy and practice for all its employees that leave in excess of accrued leave, be leave

without pay.

11. The County policy requiring hourly reductions for absences of part of day rendered these Plaintiffs and the other "job basis" employees similarly situated, not salaried employees but instead, hourly employees who were required to be paid overtime pursuant to the provisions of Sections 7(a) and (k) of the Act (29 U.S.C. § 207 (a) and (k)), and regulations of the United States Department of Labor.

12. Since August 15, 1986 and continuing to the present, the County has had reason to know of its obligation to pay such overtime compensation, and has willfully refused and failed to pay these Plaintiffs, and other "job basis" employees similarly situated, the overtime compensation earned by them.

13. Broward County has misrepresented to these Plaintiffs, and other "job basis" employees similarly situated, their rights to overtime compensation under 29 U.S.C. § 207 by classifying them as "exempt", refusing to pay them overtime, and by not posting the required notices of their rights under the Act.

14. The records concerning the number of overtime hours worked by each employee, and compensation they received in work periods in which excess hours were worked, are in the exclusive possession and under the sole custody and control of the Defendant, Broward County, and Plaintiffs are unable to state at this time the exact amount owing each of them. It is estimated that the number of employees similarly situated to Plaintiffs, is in excess of 700 and that the unpaid overtime wages total in excess of $15,000,000, exclusive of liquidated damages, attorneys' fees, and costs. Plaintiffs propose to obtain such information by appropriate discovery proceedings to be taken promptly in this cause, and request that damages be awarded according to proof thus obtained and presented to the Court.

WHEREFORE, Plaintiffs pray that judgment be entered against Defendant, Broward County, in the amounts

respectively due each plaintiff and other present and former "job basis" employees of The Broward Board of County Commissioners similarly situated, for overtime compensation, liquidated damages and interest as the Court may determine, costs under the provisions of the Fair Labor Standards Act of 1938, as amended, and reasonable attorneys' fees.

[SIGNATURE BLOCK OMITTED]

[DATE OF SERVICE: 6/17/91]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO.: 91-6537-CIV-UNGARO-BENAGES
MAGISTRATE BARRY S. SELTZER

WILLIAM KUCHINSKAS,
ROBERTA HARTWELL, on behalf
of themselves and all other
present and former employees
similarly situated,

Plaintiffs,

vs.

BROWARD COUNTY, a political
subdivision of the State of Florida

Defendant.
_____/

ANSWER

Defendant Broward County (hereinafter "Defendant") answers the complaint according to the numbered paragraphs thereof, and states:

1. Defendant admits that Plaintiffs William Kuchinskas and Roberta Hartwell have sued the Defendant for damages, attorneys' fees and costs under the provisions of Section 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. §216(b)), ("FLSA"), but denies the remainder of paragraph 1.

2. Denied as alleged. Answering further, Defendant

states that such deductions are not generally made, however, it cannot be asserted that it never occurs.

****

ADDITIONAL DEFENSES

1. The Complaint fails to state a claim upon which relief can be granted.

2. The Plaintiffs' claims are in whole or in part barred by the applicable statute of limitations.

3. The Plaintiffs' claims are in whole or in part barred by the doctrine of waiver and/or estoppel.

4. The Plaintiffs' claims are in whole or in part barred by the doctrine of Laches.

5. Any improper partial day deductions were inadvertent or made for reasons other than lack of work and are being corrected.

6. The Defendant acted in good faith in its compensation practices.

7. Any violation of 29 U.S.C. §207 is de minimis.

8. Plaintiffs and all others similarly situated are exempt from the overtime provisions of 29 U.S.C. §207.

WHEREFORE, Defendant seeks judgment and respectfully requests that the Plaintiffs take nothing by their complaint.

[SIGNATURE BLOCK OMITTED]

[DATE OF SERVICE: 7/30/91]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO.: 91-6537-CIV-UNGARO-BENAGES
MAGISTRATE BARRY S. SELTZER

WILLIAM KUCHINSKAS,
ROBERTA HARTWELL, on behalf
of themselves and all other
present and former employees
similarly situated,

Plaintiffs,

vs.

BROWARD COUNTY, a political
subdivision of the State of Florida

Defendant.
_____/

DEFENDANT'S MOTION FOR LEAVE TO AMEND ANSWER, AFFIRMATIVE DEFENSES AND PRETRIAL STIPULATION

Pursuant to Fed. R. Civ. P. 15(a) and Local Rule 16.1(G), Defendant Broward County ("County") hereby moves for leave to amend its Answer and the parties' Joint Pre-Trial

Stipulation to include an additional affirmative defense. As grounds for its motion, the Defendant states:

****

6. To properly preserve this issue in the parties' Joint Pre-Trial Stipulation, the stipulation should also be amended as follows. Paragraph 1 of the "Stipulated Facts," which again states that Defendant is an "employer" within the meaning of 29 U.S.C. Section 203(d), should be amended (amendments shown in bold) to read:

> **If the FLSA is applicable to** Defendant, a political subdivision of the State of Florida, **Defendant** is and was at all time relevant to this action a "employer" within the meaning of 29 U.S.C. Section 203(d).

Similarly, ¶ 1 of the "Issues of Law on Which There is Agreement" should be amended (amendments shown in bold) as follows:

> **If the FLSA is applicable to Defendant,** then the determination of whether Plaintiffs qualify for executive, administrative or professional exemptions to the overtime provisions of the FLSA is governed by the provisions of 29 U.S.C. § 207 and 29 C.F.R. § 541, et seq.

Finally, the following issue should be added as ¶ 13 of the "Remaining Issues of Law for the Court":

> Are the "salary basis" provisions of the FLSA constitutional as applied to the Defendant, a public employer?

7. Granting Defendant leave to amend its Answer and the Pre-Trial Stipulation will not unfairly prejudice the Plaintiffs, will not require any discovery by the parties, and will not delay the initial trial phase of this case, now set to commence March 22, 1993.

8. Pursuant to Local Rule 15.1, copies of the original Answer and Pre-Trial Stipulation are attached, as well as the amended versions, with the proposed changes highlighted.

WHEREFORE, the Defendant respectfully requests that the Court grant its motion for leave to amend its Answer, its Affirmative Defenses, and the parties' Joint Pre-Trial Stipulation.

MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR LEAVE TO AMEND

****

Under this standard, Defendant's request to amend its Answer and the Pre-Trial Stipulation should be granted.

****

CONCLUSION

Accordingly, Defendant requests that this Court grant its Motion for Leave to Amend Answer, Affirmative Defenses and Pre-Trial Stipulation to add an additional affirmative defense raising constitutional challenges to the Plaintiffs' claim. A proposed order is attached for the Court's convenience.

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[DATE OF SERVICE: 2/22/93]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO.: 91-6537-CIV-UNGARO-BENAGES
MAGISTRATE BARRY S. SELTZER

WILLIAM KUCHINSKAS,
ROBERTA HARTWELL, on behalf
of themselves and all other
present and former employees
similarly situated,

Plaintiffs,

vs.

BROWARD COUNTY, a political
subdivision of the State of Florida

Defendant.
_____/

AMENDED ANSWER

****

ADDITIONAL DEFENSES

1. The Complaint fails to state a claim upon which relief can be granted.

2. The Plaintiffs' claims are in whole or in part barred by the applicable statute of limitations.

3. The Plaintiffs' claims are in whole or in part barred by the doctrine of waiver and/or estoppel.

4. The Plaintiffs' claims are in whole or in part

barred by the doctrine of Laches.

5. Any improper partial day deductions were inadvertent or made for reasons other than lack of work and are being corrected.

6. The Defendant acted in good faith in its compensation practices.

7. Any violation of 29 U.S.C. §207 is de minimis.

8. Plaintiffs and all others similarly situated are exempt from the overtime provisions of 29 U.S.C. §207.

9. The salary basis provisions of the Fair Labor Standards Act are unconstitutional as applied to the Defendant, a public employer.

WHEREFORE, Defendant seeks judgment and respectfully requests that the Plaintiffs take nothing by their complaint.

[SIGNATURE BLOCK OMITTED]

[DATE OF SERVICE: 2/22/93]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO.: 91-6537-CIV-UNGARO-BENAGES
MAGISTRATE BARRY S. SELTZER

WILLIAM KUCHINSKAS,
ROBERTA HARTWELL, on behalf
of themselves and all other
present and former employees
similarly situated,

Plaintiffs,

vs.

BROWARD COUNTY, a political
subdivision of the State of Florida

Defendant.
_____/

AMENDED JOINT PRE-TRIAL STIPULATION

Pursuant to Local Rule 14 of the United States District Court for the Southern District of Florida and this Court's March 13, 1992 order for pretrial conference, Plaintiffs and Defendant submit the following Pretrial Stipulation.

I. NATURE OF THE ACTION

Plaintiffs are a class of 117 present and former employees of Broward County, classified by the Defendant as professional, executive and administrative employees, who seek to recover back overtime pay and liquidated damages

under the Fair Labor Standards Act (FLSA). Plaintiffs claim they are entitled to this relief because they were allegedly subject to a policy or practice that required them to use accrued "leave time" and/or reduce their actual pay to cover partial-day absences in violation of the FLSA.

II. JURISDICTION

The Court has jurisdiction over this claim pursuant to Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b).

III. PLEADINGS RAISING THE ISSUES

1. Plaintiffs' Complaint, served June 26, 1991 (attached to Defendant's Notice of Removal, filed July 15, 1991).

2. Defendant's Answer, served July 30, 1991.

IV. UNRESOLVED MOTIONS

1. Defendant's Emergency Motion for an Immediate Hearing to Compel Answers to Deposition Questions and for Protective Order, filed October 29, 1992.

2. Defendant's Petition for Hearing on Appeal regarding Magistrate's November 20, 1992 Order.

3. The parties' Joint Motion for Leave to Seek Summary Judgment or for Bifurcation of Trial, to be filed prior to the pre-trial conference.

4. Defendant's motion, not yet filed, to dismiss Janelle (Keith) Scott from the class. Defendant will assert that Ms. Scott is not an employee of Defendant's and is therefore an improper party.

5. Motions not yet filed that may become necessary if the parties are unable to resolve amongst themselves additional disputed discovery and evidentiary issues.

V. STIPULATED FACTS

1. If the FLSA is applicable to Defendant, a political subdivision of the State of Florida, Defendant is and was at all times relevant to this action an "employer" within the meaning of 29 U.S.C. § 203(d).

2. Plaintiffs, with the exception of Janelle (Keith) Scott, are or were "employees" of Defendant within the meaning of 29 U.S.C. § 203(e).

3. At all times relevant to this action, all members of the Plaintiff class earned in excess of $250 per week.

4. At all times relevant to this action, Plaintiffs have been granted leave compensation for, among other reasons, vacation, sickness, jury duty, witness duty, and bereavement, and Plaintiffs have been permitted to use this accrued leave compensation to cover personal absences of less than one day.

5. If Plaintiffs were subject to a pay system that deducted for partial-day absences, those deductions were for reasons other than lack of work.

6. During all times relevant to this action, at least seven Plaintiffs (Diane Brown, Marilyn Franks, Mary Hudson, Charles Malkus, Earl Symonette, Sloane Veshinski, and Irving Wilson) suffered actual deductions in pay due to partial-day absences.

7. In or about February 1992, all seven of these Plaintiffs who had actual deductions for partial-day absences -- as well as 66 other Broward County administrative, executive or professional employees who were identified as receiving similar deductions -- were compensated at their regular rate of pay with interest for these deductions.

8. At least prior to September 11, 1991, at least some Plaintiffs had accrued leave time reduced to pay for partial-day absences.

VI. FACTS NOT ADMITTED BUT NOT CONTESTED

The parties are aware of no facts which, though not admitted, will not be contested at trial.

VII. FACTUAL ISSUES WHICH REMAIN TO BE LITIGATED

1. The extent to which Plaintiffs were subject to a pay system which utilized paid, accrued leave to cover partial-day absences.

2. The extent to which Plaintiffs were subject to actual reductions in pay, not covered by leave time, for partial-day absences.

3. If Plaintiffs have been subject to a pay system that deducts for partial-day absences, did the Defendant act in good faith in operating such a system?

4. When were Defendant's personnel policies and practices clarified to not permit executive, administrative or professional employees' pay to be docked for absences of less than one day? And, when was the effective date of the clarification?

5. While it administered its pay system, did Defendant know or show reckless disregard for the matter of whether its conduct was prohibited by the FLSA?

6. If Plaintiffs are entitled to back overtime pay, how many overtime hours did each Plaintiff work during the compensable period?

7. If Plaintiffs are entitled to back overtime pay, at what rates of pay should they be compensated for these hours?

8. Is Plaintiff Janelle (Keith) Scott an "employee" of Defendant within the meaning of 29 U.S.C. § 203(e).

VIII. ISSUES OF LAW ON WHICH THERE IS AGREEMENT

1. ~~The~~ If the FLSA is applicable to Defendant, then the determination of whether Plaintiffs qualify for executive, administrative or professional exemptions to the overtime provisions of the FLSA is governed by the provisions of 29 U.S.C. § 207 and 29 C.F.R. § 541, et seq.

2. If Plaintiffs prevail in this action, and do not establish that Defendant's actions were knowing or showed reckless disregard for the law, they are not eligible to recover back overtime pay beyond two-years from the date they individually opted-in to this lawsuit.

3. If Plaintiffs prevail in this action and establish that Defendant's actions were knowing or showed reckless disregard for the law, they are eligible to recover back overtime pay as far back as three-years from the date they individually opted-in to this lawsuit.

IX. REMAINING ISSUES OF LAW FOR THE COURT

1. If Defendant required or permitted its executive, administrative and professional public employees to use accrued leave time to cover partial-day absences, did such a policy or practice destroy the "exempt" status of these employees, and if so for what period of time?

2. If Defendant required or permitted its executive, administrative and professional public employees to take leave without pay to cover partial-day absences, did such a policy or practice destroy the "exempt" status of these employees, and if so for what period of time?

3. If Plaintiff(s) did not suffer any actual deductions for partial-day absences, may they still recover back overtime pay for the period in which they were allegedly theoretically "subject to" such deductions?

4. Did Defendant's decision to prospectively change its partial-day absence policy and reimburse its employees who may have previously suffered partial-day pay deductions bring Defendant within the FLSA's so-called "window of correction" thereby absolving it of liability?

5. Effective September 6, 1991, did the addition of 29 C.F.R. § 541.5d to the Department of Labor's interpretive regulations governing overtime pay affirmatively make it permissible for public sector employees to require their "exempt" employees to use leave time and/or dock pay

to cover partial-day absences?

6. If Defendant made improper deductions for partial-day absences, did such deductions only result in the loss of the overtime exemption for the employee whose pay was docked -- and then only for the workweek in which the deduction was made -- or did such deductions cause the entire Plaintiff class to lose its entire overtime exemption?

7. If Plaintiffs prevail in this action, are they entitled to liquidated damages? If so, in what amount?

8. If Plaintiffs prevail in this action, whether Defendant has shown to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that it had reasonable grounds for believing that its act or omission was not a violation of the FLSA.

9. If Plaintiffs prevail in this action, did Defendant know or show reckless disregard for the law?

10. If Plaintiffs prevail in this action, are they entitled to prejudgment interest?

11. Is Plaintiff Janelle (Keith) Scott an "employee" of Defendant within the meaning of 29 U.S.C. § 203(e)?

12. If Defendant is found to have violated the FLSA, the nature and extent of relief to which Plaintiffs would be entitled.

13. Are the "salary basis" provisions of the FLSA constitutional as applied to the Defendant, a public employer.

X. EXHIBITS

1. Plaintiffs' numbered list of trial exhibits (other than impeachment exhibits), with objections, is attached hereto and marked as Attachment A.

2. Defendant's numbered list of trial exhibits (other than impeachment exhibits), with objections, is attached hereto and marked as Attachment B.

The parties have agreed that, up until ten days prior to trial, each party may add to its exhibit list any document already produced by either party pursuant to a request made

under Fed. R. Civ. P. 34. Each party preserves any and all objections it may have to the exhibits of the other party.

XI. WITNESSES

1. Plaintiffs' numbered list of trial witnesses, other than impeachment witnesses, is attached hereto and marked as Exhibit C.

2. Defendant's numbered list of trial witnesses, other than impeachment witnesses, is attached hereto and marked as Exhibit D.

The parties have agreed that, up until ten days prior to trial, each party may add to its witness list, and that any such additional witness are subject to being deposed before trial. Each party preserves any and all objections it may have to the witnesses or testimony of the other party's witnesses.

XII. TRIAL TIME

The estimated time needed to try this case, unless bifurcated, is four to six weeks. Pursuant to the parties' joint motion, if this action is bifurcated, the parties' estimate that it will only take 1-2 days to try the first six issues of law identified above.

XIII. ATTORNEY'S FEES

The amount awardable is within the discretion of the Court and cannot be estimated with any certainty until completion of the proceedings. The parties agree that all issues of attorney's fees should be adjudicated after the substantive proceedings are concluded, and the parties have therefore not included attorney's fees witnesses and exhibits on Attachments A, B, C or D.

[SIGNATURE BLOCKS OMITTED]
[DOCUMENT UNSIGNED]

DATED _____, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO.: 91-6537-CIV-UNGARO-BENAGES
MAGISTRATE SELTZER

WILLIAM KUCHINSKAS, ROBERTA HARTWELL, on behalf of themselves and all other present and former employees similarly situated,

Plaintiffs,

vs.

BROWARD COUNTY, a political subdivision of the State of Florida,

Defendant.
_____/

PLAINTIFFS' RESPONSE TO DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF ITS CLAIM CHALLENGING THE CONSTITUTIONALITY OF THE FLSA AND ITS SALARY BASIS REGULATION

****

The FLSA requires every employer, whether public or private, to pay employees at the rate of time and one-half for all

hours worked over 40 in a given work-week. 29 U.S.C. sect. 207. The FLSA also allows an employer, whether public or private, to exempt from these overtime requirements, any employee who is a "bona fide" executive, administrator or professional, as those terms are "defined and delimited" by the Secretary of Labor. 29 U.S.C. sect. 213(a)(1).

Pursuant to its statutory authority, the Department of Labor (DOL) set forth this criteria in 29 C.F.R. Part 541. Basically the criteria analyzes the relationship between the employer and employee with respect to the employee's job duties[2], and with respect to the manner in which the employee is paid (the "salary basis" test). This analysis is to determine whether the employee is in fact treated as an executive, administrator, or professional, rather than treated as an hourly employee.

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[DATE OF SERVICE: 3/23/93]

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[2]Plaintiffs do not concede that their duties comport with the requirements for designation as executives, administrators, or professionals, set forth in the regulations. However, if the "salary basis test" is not met, they are not exempt from the overtime provisions and an analysis of their job duties would not be necessary.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION
CASE NO.: 91-6537-CIV-UNGARO-BENAGES
MAGISTRATE BARRY S. SELTZER

WILLIAM KUCHINSKAS,
ROBERTA HARTWELL, on behalf
of themselves and all other
present and former employees
similarly situated,

Plaintiffs,

vs.

BROWARD COUNTY, a political
subdivision of the State of Florida

Defendant.

_____/

NOTICE OF FILING PROPOSED FINAL JUDGMENT

Pursuant to the Court's Order of September 7, 1993, Defendant Broward County hereby submits a proposed FINAL JUDGMENT in the above-styled matter. (copy attached)

Respectfully submitted,
MORGAN LEWIS & BOCKIUS
Special Counsel to Defendant

By: /s/
Peter J. Hurtgen

Fla. Bar No. 229921
Michael G. Whelan
Fla. Bar No. 608423
Wayne D. Rutman
Fla. Bar No. 782424
JOHN J. COPELAN, JR.
County Attorney for Broward County
115 South Andrews Avenue
Ft. Lauderdale, Florida 33301
Telephone: (305) 357-7600

Norman M. Ostrau
Assistant County Attorney
Fla. Bar No. 273971
Rebecca L. Kay
Assistant County Attorney
Fla. Bar No. 705519

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true copy of the foregoing was mailed to JACK SCAROLA, ESQ., Searcy Denney Scarola Barnhart & Shipley, P.A., Attorneys for Plaintiffs, 2139 Palm Beach Lakes Blvd., West Palm Beach, FL 33402; and BRENDA J. CARTER, ESQ., Attorney for Plaintiffs, Suite 400-19, 1901 West Cypress Creek Road, Fort Lauderdale, Florida 33309, this 16th day of September, 1993.

/s/
MICHAEL G. WHELAN

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION
CASE NO.: 91-6537-CIV-UNGARO-BENAGES
MAGISTRATE BARRY S. SELTZER

WILLIAM KUCHINSKAS,
ROBERTA HARTWELL, on behalf
of themselves and all other
present and former employees
similarly situated,

Plaintiffs,

vs.

BROWARD COUNTY, a political
subdivision of the State of Florida

Defendant.
_____/

[PROPOSED]
FINAL JUDGMENT

THIS CAUSE came before the Court for a non-jury trial, the Honorable Ursula Ungaro-Benages, District Judge, presiding. The issues have been duly tried, and the Court having rendered its Order containing Findings of Fact and Conclusions of Law on September 7, 1993, it is hereby

ORDERED AND ADJUDGED that **FINAL JUDGMENT** on the merits is hereby **ENTERED** in this case in favor of the Defendant and against the Plaintiffs, with the Plaintiffs to take nothing by their Complaint. The Defendant, shall recover its costs from Plaintiffs, in an amount to be set by the Court upon the filing of a motion to tax costs by the Defendant.

DONE AND ORDERED in Chambers at Miami, Florida, this ___ day of _____, 1993.

_____

URSULA UNGARO-BENAGES
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

copies provided:

John Scarola, Esquire
Brenda J. Carter, Esquire
Michael G. Whelan, Esquire
John J. Copelan, Esquire

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO.: 91-6537-CIV-UNGARO-BENAGES
MAGISTRATE BARRY S. SELTZER

WILLIAM KUCHINSKAS,
ROBERTA HARTWELL, on behalf
of themselves and all other
present and former employees
similarly situated,

Plaintiffs,

PLAINTIFFS' OBJECTIONS TO DEFENDANT'S PROPOSED FINAL JUDGMENT

vs.

BROWARD COUNTY, a political
subdivision of the State of Florida

Defendant.
_____/

Plaintiffs file the following objections to Defendant's, BROWARD County, proposed final judgment that was served September 16, 1993:

1. The proposed final judgment states, "Plaintiffs to take nothing by their Complaint." In an FLSA action for overtime wages the burden of proof is on the employer to prove that the employee is exempt. To meet its burden, the employer must prove that the employee meets *both* of two tests - the job duties test and the "salary basis" test. *Atlanta Professional*

Firefighters Union v. City of Atlanta, 920 F.2d 800, 804-805 (11th Cir. 1991).

2. The issue of job duties was not tried before the Court. The Court's Order dated September 7, 1993 merely ruled on the salary basis test. Plaintiffs have neither conceded nor stipulated that the job duties of the 116 Plaintiffs comport with the DOL regulations defining bona fide executives, administrators, and professionals. Accordingly, a final judgment cannot be entered until Broward County proves at trial that each Plaintiff's job duties meet the standards provided in the regulations.

3. For example, are the 97% of plaintiffs who have 4 to 6 levels of supervision above them, top managers or highly-paid administrators of Broward County? For instance, Broward County will have to prove that, the 10 Plaintiffs who are social workers making $10 to $12 an hour; the 7 Plaintiffs who are accountants only one step above entry level, making $15 to $16 an hour; management "interns" and office "managers" making $12 an hour; employees who repair street signs; and employees who drive ambulances, among others, all individually qualify as executive, administrators or professionals of Broward County as those terms are defined by the DOL regulations.

****

WHEREFORE Plaintiffs respectfully request that the Court reject Broward County's proposed final judgment.

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[DATE OF SERVICE: 9/21/93]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO.: 91-6537-CIV-UNGARO-BENAGES
MAGISTRATE SELTZER

WILLIAM KUCHINSKAS, ROBERTA HARTWELL, on behalf of themselves and all other present and former employees similarly situated,

Plaintiffs,

vs.

BROWARD COUNTY, a political subdivision of the State of Florida,

Defendant.
_____/

PLAINTIFFS' MOTION FOR NEW TRIAL, AND TO ALTER OR AMEND JUDGMENT AND SUPPORTING MEMORANDUM OF LAW

****

I. Final Judgment & Costs

The Court entered final judgment and provided for costs to be awarded to the County. The burden of proof is on the employer to prove that the employees to whom it denies payment for overtime hours, are exempt from the FLSA. To meet this burden, the employer must prove both of two tests - the job duties test and the salary basis test. *Atlanta Professional Firefighters Union v. City of Atlanta*, 920 F.2d 800, 804-805 (11th Cir. 1991).

The Court's opinion only addressed the salary basis test. The issue of the Plaintiffs' job duties has not been tried. Plaintiffs have neither conceded nor stipulated that their job duties meet the criteria established by the DOL for bona fide executives, administrators, and professionals. *See* Plaintiffs' Response to Defendant's Claim Challenging Constitutionality dated March 23, 1993, at 4 n.2 ("Plaintiffs do not concede that their duties comport with the requirements for designation as executive, administrators, or professionals ..."). *See also* Plaintiffs' objections served September 21, 1993.

Until the issue of job duties[1] is adjudicated, final judgment in favor of the County is improper because the County has not proven that Plaintiffs are exempt from the FLSA. The County's bald assertions that Plaintiffs are executives and administrators are not sufficient. Whether particular duties are administrative or managerial is governed by the regulations of the DOL. *Icicle Seafoods, Inc.v. Worthington*, 475 U.S. 709. 714 (1986).

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[DATE OF SERVICE: 10/4/93]

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[1]Contrary to the County's characterization of Plaintiffs as "top managers" and "highly paid administrators" of Broward County, the overwhelming majority of Plaintiffs have 4-6 levels of supervision above them, and for example are social workers making $10 to $12 an hour, and "accountants" only one step above entry level. The County's "executive" employees who were not paid for their overtime hours, but yet had their pay reduced for partial day absences, earned as little as $6.897 and $8.00 an hour. Plaintiffs' Exhibits 55, 59 (Tab #9, #10), and 56 (Tab #25).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO.: 91-6537-CIV-UNGARO-BENAGES

MAGISTRATE BARRY S. SELTZER

WILLIAM KUCHINSKAS,
ROBERTA HARTWELL, on behalf
of themselves and all other
present and former employees
similarly situated,

Plaintiffs,

vs.

BROWARD COUNTY, a political
subdivision of the State of Florida

Defendant.
_____/

DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR NEW TRIAL

*****

Similarly, Plaintiffs' argument that this Court must now address the issue of whether Plaintiffs' "job duties" satisfy the FLSA exemption requirements is also completely without merit. Plaintiffs failed to raise a "duties" contention in either the Complaint, their motion to distribute class notices, or the

parties' joint pre-trial stipulation. While Plaintiffs do not themselves suggest a basis by which this Court might now permit them to advance a legal theory that is clearly beyond the pleadings, Plaintiffs presumably rely upon Fed. R. Civ. P. 15(b). Rule 15(b), in limited circumstances, allows for the post-trial amendment of pleadings to "conform to the evidence."

However, Rule 15(b) "will not allow a losing party to add a new theory which would necessitate a new trial or otherwise overthrow the verdict or judgment; the purpose of allowing conforming amendments after judgment is to support the judgment, not to nullify the judgment and begin a new contest." 27 Fed. Prac. , L. Ed. §62:291 (1984), *citing U.S. v. City of Brookhaven,* 134 F.2d 442, 446 (5th Cir. 1943) (new cause of action may not be asserted after final judgment, as Rule 15(b) "does not authorize an amendment to nullify the judgment and begin a new contest.") *See also Cook v. City of Price,* 566 F.2d, 699, 702 (10th Cir. 1977) ("it would be unjust to the opposing party to consider a new theory of recovery after trial is complete.:); *Regal Properties v. Greenberg,* 538 S.W. 2d 190, 191 (Tex. Civ. App. 1976) ("After a plaintiff has suffered an adverse verdict on the only cause of action stated in his pleading, to permit him to recover on the theory that a different cause of action . . . would go against elemental considerations of fairness.").

Given this precedent, it is clear that Plaintiffs' unsuccessful salary basis claim may not now be resurrected through the advancement of a newly concocted "duties" theory of recovery. Accordingly, the final judgment of the Court should be affirmed.

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[DATE OF SERVICE: 10/20/93]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO.: 91-6537-CIV-UNGARO-BENAGES
MAGISTRATE BARRY S. SELTZER

WILLIAM KUCHINSKAS,
ROBERTA HARTWELL, on behalf
of themselves and all other
present and former employees
similarly situated,

Plaintiffs,

PLAINTIFFS' MOTION FOR CLARIFICATION

vs.

BROWARD COUNTY, a political
subdivision of the State of Florida

Defendant.
_____/

Plaintiffs move the Court for clarification of its Order dated November 19, 1993 denying "Plaintiff's (sic) Motion for New Trial [D.E. 191]", and state:

****

4. If the Order was meant to deny both motions, or only the Motion for New Trial, Plaintiffs respectfully request that for the benefit of the record, the Court articulate its reasons for denying the Motion for New Trial, particularly;

(a) the legal and factual basis for relieving the County-employer of its burden of proof on the job duties test for exemption; and

(b) the legal and factual basis for relieving the County-employer from having to repay all the money that was illegally docked from the pay of job basis employees; and

(c) the legal and factual basis for denial of the issues raised by Plaintiffs relating to the Eleventh Circuit's decision in *Atlanta Firefighters*.

Wherefore, Plaintiffs respectfully request clarification of Order dated November 19, 1993, so that it is clear on the record which motion was denied, or whether both motions were denied; and clarification of the Court's basis for denial of the Motion for New Trial if indeed that is what the Order was meant to do.

[SIGNATURE BLOCK OMITTED]

[DATE OF SERVICE: 11/26/93]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO.: 91-6537-CIV-UNGARO-BENAGES
MAGISTRATE BARRY S. SELTZER

WILLIAM KUCHINSKAS,
ROBERTA HARTWELL, on behalf
of themselves and all other
present and former employees
similarly situated,

Plaintiffs

PLAINTIFFS' SUPPLEMENT TO MOTION FOR CLARIFICATION

vs.

BROWARD COUNTY, a political
subdivision of the State of Florida

Defendant.
_____/

Plaintiffs file this supplement to their motion for clarification dated November 26, 1993, and state:

1. Plaintiffs' November 26, 1993 motion sought clarification. It also requested additional findings of law and fact. Defendant Broward County (County), did not respond or

object to the motion. To date, the Court has not rendered a decision on the motion[1].

****

MEMORANDUM OF LAW

Plaintiffs respectfully request the Court's assistance in determining the status of the record in this action regarding the issues raised in their November 26, 1993 motion for clarification and their November 26, 1993 motion for reconsideration.

****

Secondly, significant issues were raised in the motion for new trial which were not addressed either in the Court's September 7, 1993 findings of fact and conclusions of law, or in the Court's November 19, 1993 Order. See *Didie v. Howes*, 988 F.2d 1097, 1104 (11th Cir. 1993) (court encouraging trial courts to articulate legal and factual conclusions with respect to motions relevant to appeal).

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[DATE OF SERVICE: 12/29/93]

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[1]There has also been no decision on the County's motion to tax costs to which Plaintiffs responded on November 5, 1993. (The County did not file a reply), and no decision on Plaintiffs' November 26, 1993 motion for reconsideration (to which County did not respond) of November 19 Order denying motion to alter/amend.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

CASE NO.: 91-6537-CIV-UNGARO-BENAGES
MAGISTRATE BARRY S. SELTZER

WILLIAM KUCHINSKAS,
ROBERTA HARTWELL, on behalf
of themselves and all other
present and former employees
similarly situated,

Plaintiffs,

PLAINTIFFS' MOTION FOR SANCTIONS WITH SUPPORTING MEMORANDUM OF LAW

vs.

BROWARD COUNTY, a political
subdivision of the State of Florida

Defendant.
_____/

Plaintiffs move the Court for imposition of sanctions against Defendant Broward County (County) and the County's attorneys, pursuant to the Court's inherent powers, Fed.R.Civ.P. 11, 28 U.S.C. section 1927, and 18 U.S.C. section 401(1), and state:

1. The law firm of Morgan, Lewis & Bockius (MLB) was retained by the County on March 26. 1990 to provide legal services as its labor counsel and appeared as special counsel to defend this lawsuit which was filed on June 18, 1991. All pleadings, motions and papers filed by MLB in this action list Peter J. Hurtgen, Michael G. Whelan, and Wayne

D. Rutman as counsel.

2. On April 23, 1993 a notice of appearance of additional counsel was filed adding the County's in-house attorneys, John J. Copelan Jr., Rebecca Kay, and Norman Ostrau. All subsequent papers filed with the Court included them as attorneys of record.

3. During the course of this litigation, the County and its attorneys violated the letter and spirit of Rule 11 by:

(a) filing papers for the improper purpose of intentionally misleading the Court and maligning Plaintiffs;

(b) filing papers which affirmatively stated facts that they knew from their own personal knowledge were false.

4. During the course of this litigation, the County and its attorneys engaged in the following conduct which may be punished by the Court pursuant to 18 U.S.C. section 401(1) as misconduct occurring in the Court's presence:

(a) reading deposition testimony at trial knowing that the testimony regarding Morgan, Lewis & Bockius was false.

5. In addition to the above misconduct, the County and its attorneys engaged in the following bad faith conduct, and unreasonably and vexatiously increased the costs of this litigation by:

(a) refusing to correct misrepresentations with the Court when evidence of the misrepresentations was brought to their attention, despite knowledge that the Court had incorporated the factual misstatements into its own findings of fact in its Order dated September 7, 1993;

(b) encouraging the Court's reliance on false statements knowing that Plaintiffs would

not have an opportunity to respond

MEMORANDUM OF LAW

I. The Representations That Were Made

The deposition of Scott Bugg, a Personnel Management Specialist with the County, was taken by Plaintiffs' counsel on November 19, 1992 with Mike Whelan in attendance as attorney for the County. At trial, attorney Whelan read the following excerpts from that deposition:

Q. Tell me about those discussions if you would.

A. He and I were both aware of the case [Abshire] as was Jim Acton, our Labor Relations Officer. I don't think we had, or I don't recall any in depth discussions. Abshire was a concern at the time I was immersed in a County wide classification pay study, basically discussions were, here are some things to be concerned about, we'll contact legal counsel, get their thinking, and I believe Phil [Rosenberg] in fact did that, and we had kind of a wait and see based on legal advice.

* * *

Q. (By Mr. Scarola) Was this advice rendered prior to the institution of any litigation concerning the application of the Fair Labor Standards Act to Broward County employees?

A. Yes.

Q. And the purpose in seeking the advice was to determine what the policies, practices, and procedures of Broward County ought to be in order to conform to the law?

A. The purpose of seeking advice was to determine what the impact of Abshire might be on the

county's (sic) policies and procedures.

Q. Did you receive a response to those inquiries in writing?

A. Phil may have; I don't recall it.

Q. Who was the individual responding to those inquiries, the name of the lawyer?

A. As far as I am aware, it was Mike Whelan.

Bugg Depo., p. 51 to pg. 52; tr.. 260.

Subsequently, attorney Whelan signed Defendant's Post-Trial Summation of Evidence which specifically referenced the above portion of the Bugg deposition and included the following statements of "fact":

> The *Abshire* decision, which rejected long-standing public accountability principles in favor of a total prohibition on deductions for partial day absences, spurred wide-scale discussion in the public sector. Rosenberg responded by contacting the County's new labor attorneys, Morgan, Lewis & Bockius, and initiating a comprehensive review of the County's partial day absence policy. (Tr.. 260, 97).
>
> * * *
>
> However, Rosenberg's attempt to respond to *Abshire* resulted in one unpleasant consequence for the County; [Evan] Lukic, [William] Kuchinskas, and several other managers whom Rosenberg contacted for help decided to file a "salary basis" lawsuit. While this action no doubt hampered the County's efforts to take remedial action, it prompted no change in the County's payroll policies. (Tr.. 260)

County Brief at p. 22 to p. 23.

Attorney Whelan also signed and filed Defendant's Post-trial Proposed Findings of Fact, which included the following "facts":

> 15. Following the Ninth Circuit's decision in *Abshire v. County of Kern*, the County launched another full-scale review of its payroll practices, with the assistance of new labor counsel. (Tr.. 260, 97)
>
> 16. . . . . However, Rosenberg's actions had the unintended consequence of prompting Kuchinskas, Lukic and other top managers to file a salary basis lawsuit against the County. . . . The lawsuit did not alter the County's existing FLSA compliance efforts. (Tr.. 260)

County Proposed Findings of Fact at p. 6.

With these statements of "fact" and the quote from the Bugg deposition, the County and its attorneys clearly intended to convey to the Court that: MLB was consulted after the *Abshire* decision (7/90) and before this lawsuit was filed (6/91) to assist the County in a full-scale review of its payroll policies, that this review took place, and that this lawsuit had no effect on the County's action. They also clearly intended to create the impression that Evan Lukic and Bill Kuchinskas immediately filed this lawsuit as a result of being asked for help, and obstructed the County's compliance efforts.

The Court incorporated these "facts" into its own findings:

> 16. . . . Therefore the County, with the assistance of new labor counsel, launched another full-scale review of its payroll practices. (Tr.. 260, 97)

> 17. . . . Soon after these communications, Kuchinskas, Lukic and other top managers filed a salary basis lawsuit against the County . . . The lawsuit did not alter the County's existing FLSA compliance efforts. (Tr.. 260).

Court Order dated September 7, 1993, Findings of Fact.

Because of the short trial notice, (Tr.. 1-6), Plaintiffs were not available to rebut these false statements in person. Because responses to Post-trial briefs were not permitted (Tr.. 273), Plaintiffs also could not rebut the false statements of fact contained in the County's briefs. Knowing that Plaintiffs could not respond, the County's representatives and its attorneys seized the opportunity to spew forth "facts" they knew to be false, in a flagrant and unconscionable plan of misleading the Court and maligning Plaintiffs.

II. These Representations Were Known to be False

When the deposition testimony was read into the record at trial, and the briefs were written and submitted, the County's representatives and its attorneys all knew of their own personal knowledge that the representations made to the Court were false.

On November 20, 1992, right after Bugg's deposition, Plaintiffs issued a public records request #10 seeking, "[a]ny and all correspondence of any kind, dated prior to June 18, 1991 from Michael G. Whelan, any other attorney, or any agent of Morgan, Lewis & Bockius to any employee or representative or Broward County, that dealt with the *Abshire* decision or any issue of exemption from the overtime provisions of the FLSA, along with copies of the responses from Broward County". Ex. 1. Neither the County nor MLB produced any documents that

were responsive to this request[1]. *See* Ex. 2.

On October 11, 1993, Plaintiffs issued a public records request seeking "[a]ll billings submitted by Morgan, Lewis & Bockius for legal services performed from January 1, 1990 to August 30, 1991" and [a]ll retainer agreements and agreements for the performance of legal services, between Morgan, Lewis & Bockius and Broward County which were entered into between January 1, 1988 and the present". Ex. 3.

Documents responsive to the October 11, 1993 request are attached. *See* Ex. 4. These documents clearly show that although MLB became the County's labor counsel on March 26, 1990, it never did any work related to a review of the County's partial day absence policies, was never consulted about the *Abshire* decision, and was never engaged in any review of the County's payroll and leave policies -- That is, not until August, 1991, and then only as a direct result of, and in direct response to, the filing of this lawsuit[2].

The full-scale review in August, 1991, conducted as a result of this lawsuit, was done in order to provide the County with defenses. The audit to ascertain the employees who were impermissibly docked was only done when attorney Whelan told the County to do it. Attorney Whelan wanted to see if any deductions had occurred and he advised repayment if such

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[1]Nor were any documents of this type produced pursuant to Plaintiff's Request for Production of Documents. Tab 63.

[2]It should also be noted that the docking of pay of job basis employees continued unabated until September 20, 1991. Tr.. Ex. 59, Tab 10. It is hardly credible that the full-scale review that purportedly took place right after July, 1990 allegedly with MLB's assistance, allowed this docking to continue another year.

docking was found so that the County could use the window of correction as a defense. *See* Ex. 5 -- Whelan letter dated 8/8/91. If a previous review had in fact ever been done, obviously they would already have known by August, 1991 that the docking had taken place and Whelan's letter would no doubt have reflected that fact.

The record shows that Evan Lukic, along with 112 other County job basis employees, exercised his opt-in rights on July 2, 1992 (more than a year after the lawsuit was filed) as a result of having received a Court-authorized notice of such rights. The County's attorneys knew this because of the date on Lukic's consent form, and because of the uproar that ensued after he opted-in. *See* Defendant's Motion for Emergency Hearing dated October, 1992 and the subsequent related flurry of briefs and appeals. The notion that Evan Lukic turned right around and filed a lawsuit when he was asked for help, was pure fabrication.

Bill Kuchinskas retired from the County effective March 15, 1991 as indicated in the county's own records. It is hardly credible that the director of a division that records mortgages and deeds was asked for help in this alleged major full-scale review of personnel policies, a mere couple of weeks before his retirement when assistant County attorney Kay on March 4, 1991 had offered her own assistance in drafting new procedures.

It is a particularly incredible assertion since Bugg, a key member of Rosenberg's personnel staff, testified that they decided to do nothing but "wait and see". Bugg Depo. 51 to 52.

****

[SIGNATURE BLOCK OMITTED]

[DATE OF SERVICE: 11/29/93]

APPENDIX H

BROWARD COUNTY CIVIL SERVICE RULES AND REGULATIONS

[Pre-September, 1991]

PART I. OBJECTIVES AND SCOPE

****

14.3: Positions Covered. These regulations shall apply to all positions in the Classified Civil Service *** and shall include all employees serving in continuing positions in Broward County, ***

****

14.6: Definition of Terms.

****

m. Employee - means any person holding a position or employment with the County and who is paid wholly or in part from County funds.

PART XIV. DISCIPLINARY ACTION

14.187. Intent.

a. The authority of the County Administrator, or designated representatives, to take disciplinary action when warranted is incidental to the authority to appoint.

It is the intent of the governing authority of Broward County that effective supervision and employee relations will avoid most matters which necessitate disciplinary action. The purpose of the Rules, and disciplinary action for violations of such Rules, is not intended to restrict the rights of anyone but to insure the rights of all and secure cooperation and orderliness throughout the Classified Service.

[90-AC-36, 9/11/90]

****

14.188. Types of Disciplinary Action.

a. Unless otherwise provided by the Broward County Code or general laws, the provisions set forth in this Chapter shall govern disciplinary actions affecting classified employees.

b. A department, division or office head shall have such power and authority as shall be necessary to discipline subordinates in accordance with the disciplinary provisions set forth in this section:

****

3. Suspension - The County Administrator or his/her designee may, for good cause, suspend any employee with or without pay for a specified period of time, or for a period of time conditioned upon the occurrence of a specified event.

****

14.189. Reasons for Disciplinary Actions.

a. Disciplinary action may be taken for any one or more of the following:

1. Conviction of a crime involving moral turpitude.

2. Absenteeism.

3. Absence without leave or failing to report after leave of absence has expired.

4. Excessive tardiness.

5. Abuse of sick leave.

6. Insubordination or serious breach of discipline.

7. Insufficiency or incompetency.

8. Abuse or theft of County property.

9. Loss of job requirements, such as loss of necessary license, that prevents adequate performance of assigned duties.

10. Willfully giving false statements to supervisors, officials, the public or any agency of County Government.

11. Violation of the County code, the Administrative Code or regulations, departmental rules, or these Rules and Regulations.

12. Drinking of alcoholic beverages while working,

or being intoxicated on the job.

[90-AC-36, 9/11/90]

13. Discovery of any false statement in an application, omission of pertinent and material information from an application, or any other attempt to deceive the County in an application.

[91-AC-30, 9/11/91]

14. Acceptance of gratuities in conflict with the policy outlined in Part XX[10] of these Rules and Regulations.

15. Refusal to be examined by a County designated, fully licensed physician when so directed.

16. Political activity in conflict with the Civil Service Code or these Rules and Regulations.

[90-AC-36, 9/11/90]

17. Wantonly offensive conduct or language toward the public, supervisors, or fellow employees, including but not limited to language or conduct reflective of sexism, racism, or bigotry, such as the use of ethnic slurs or disparaging comments based upon race, religion, disability, or sex.

[91-AC-39. 9/11/91]

b. The foregoing is not a complete list of all actions which

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[10]Editor's Note: "Part XX" is substituted here for "Section 119" in the approved Resolution

could result in disciplinary action but is intended as a general disciplinary guide for all County employees and supervisors.

[90-AC-36, 9/11/90]

****

PART XIV. ATTENDANCE AND LEAVE

14.224: Hours of Work. *** Tardiness with unexcused absence from work will cause the employee to be penalized fifteen minutes pay for each fractionalized part of fifteen minutes he/she is late.

14.228. Annual Leave.

****

d.2.: Request for Leave. *** If an employee has insufficient leave credits to cover a period of absence, *** payroll deductions for the time lost shall be made ***

e: Minimum Charge - One hour is the minimum charge for either annual leave or sick leave, and additional leave is charged in multiples of one hour ***

****

14.229. Sick Leave.

****

g. Abuse of Sick Leave Privilege - Should it be discovered that an employee is taking sick leave under false pretenses, the time off shall be without pay. The employee may also be subject to disciplinary action.

****

j. When earned Sick Leave is Exhausted -- *** Exhaustion of all accumulated sick and annual leave shall be charged to leave without pay.

14.232. Funeral Leave. *** Any absence in excess of this amount shall be charged to annual leave, *** or to leave without pay if the employee has no annual leave accumulated.

****

14.239: Absences Without Leave. An absence of an employee from duty, including any absence for a single day or part of a day, that is not authorized by a specific grant of leave of absence under the provisions of these Regulations shall be deemed to be an absence without leave. Any such absence shall be without pay and shall be subject to disciplinary action.

CIVIL SERVICE RULES AND REGULATIONS

Revised September 1991 [*]

DIVISION OF PERSONNEL
DEPARTMENT OF FINANCE AND
ADMINISTRATIVE SERVICES

[* All relevant provisions remained the same. Only 14.39 and 14.224 were changed after September 1991.]

[INTRODUCTORY LETTER TO BROWARD COUNTY CSRR]

Broward County's centralized personnel system operates under guidelines established in its Civil Service Rules & Regulations. These rules guide thousands of personnel decisions in County service such as recruitment, testing, selection and many others which occur in a large public corporation. The rules include policies on transfer, demotion, attendance, discipline, training and many other subjects. All are guided by the Board of County Commissioners and the County Administrator's basic criteria that our processes be job related and reflective of our strong commitment to Equal Employment Opportunity and Affirmative Action. Further, we want these rules to be available and understandable to a wide variety of readers including County supervisors and managers, employees and applicants, and members of the public.

The staff members of Broward County's Personnel Division are dedicated to making these rules work in an equitable and humane manner for the benefit of County departments, divisions, employees, and the public at large.

To this end, we have produced this booklet containing the Civil Service Rules and Regulations which includes all revisions approved by the Board of County Commissioners as of September 11, 1991.

Phil Rosenberg, Director
personnel Division

PR/cb
[csc]

PART IV. PAY PLAN

14.39. Application.

All persons in Classified Service positions shall be employed and paid in accordance with the rates and policies established by the Pay Plan for the specific job classification under consideration. Notwithstanding any provisions of this chapter, employees designated by the County as exempt from the provisions of the Fair Labor Standards Act, whether in the Classified Civil Service or excepted from Classified Civil Services, shall be considered to be compensated on a salaried, rather than hourly basis. Such employees shall not be subject to compensation reductions for absences of less than a day.

[91-AC-39, 9/11/91]

****

PART XIV. ATTENDANCE AND LEAVE

14.224. Hours of Work. *** Tardiness with unexcused absences from work will cause hourly (non-exempt) employees to be penalized fifteen minutes pay for each fractionalized part of fifteen minutes he/she is late.

[91-AC-39, 9/11/91]

APPENDIX I

TRIAL TRANSCRIPT

[Volume I, May 26, 1993]

[17]

MR. SCAROLA: Number two: Plaintiffs, with the exception of Janelle, spelled J-a-n-e-l-l-e, parens, Keith, K-e-i-t-h, parens, Scott, S-c-o-t-t, are or were, quote, employees, unquote, of defendant within the meaning of 29 USC Section 203(e).

Three: At all times relevant to this action, all members of the plaintiff class earned in excess of $250 per week.

Four: At all times relevant to this action, plaintiffs have been granted leave compensation for, among other reasons, vacation, sickness, jury duty, witness duty and bereavement, and plaintiffs have been permitted to use this accrued leave compensation to cover personal absences of less than one day.

Five: If plaintiffs were subject to a pay system that deducted for partial-day absences, those deductions were for reasons other than lack of work.

Six: During all times relevant to this action at least seven plaintiffs, parens, Diane Brown, Marilyn Franks, F-r-a-n-k-s, Mary Hudson, Charles Malkus, M-a-l-k-u-s, Earl Symonette, S-y-m-o-n-e-t-t-e, Sloane, S-l-o-a-n-e, Veshinski, V-e-s-h-i-n-s-k-i, and Irving Wilson suffered actual

[18]

deductions in pay due to partial-day absences.

Seven: In or about February 1992 all seven of these plaintiffs who had actual deductions for partial-day

absences as well as sixty-six other Broward County administrative, executive or professional employees who were identified as receiving similar deductions were compensated at their regular rate of pay with interest for these deductions.

Eight: At least prior to September 11, 1991, at least some plaintiffs had accrued leave time reduced to pay for partial-day absences.

That concludes publication of the stipulations from the joint pretrial stipulation.

At this time I request permission of the Court to publish responses of the defendants to requests for admissions.

These requests were propounded on April 23, 1992. The response was filed on May 26, 1992.

Defendants were asked to admit --

[19]

MR. SCAROLA: The defendant was asked to admit each of the following statements:

One: The County's job basis employees are not paid additional compensation for any hours worked in excess of forty in a given week.

To which the defendant responded: Admitted, provided that, quote, additional compensation, unquote, refers to premiums added to a job basis employee's salary for hours worked in excess of forty in a given work week.

Request number four: For the time period beginning April 15, 1986, some County job basis employees had their salary reduced for partial-day absences.

Answer: Admitted.

Would your Honor like me to file these at this time?

THE COURT: Yes, please.

****

[25]

THE COURT: Which interrogatory number was that?

MR. SCAROLA: Number seventeen, your Honor.

THE COURT: Okay.

MR. SCAROLA: Answer: Same answer as to interrogatory number sixteen except that sick leave, sick leave donation and/or compassionate leave cannot be substituted for personal leave.

Interrogatory number eighteen: For County policies existing from January '85 to the present describe the circumstances under which a job basis employee's pay might be reduced and the reasons for any changes in policy.

Answer: Job basis employees pay could be reduced during this period for tardiness, unauthorized absence, leave without pay or demotion.

On September 11, 1991 the policy was changed such that job basis employees could no longer be docked for tardiness. The policy was changed to clarify it.

Interrogatory number nineteen: For the period January 1985 to the present list all job basis employees whose salary was reduced because of a partial-day absence or for other reasons. Include the dates, reasons for and the amount of salary reduction.

Answer: A list of job basis employees whose salaries were reduced because of partial-day absences for the

[26]

period June, 1988 until September 6, 1991 has been produced in response to plaintiffs' first request for production of documents number one.

****

[27]

Interrogatory number twenty-five: Describe the instructions given to County job basis employees from January '85 to the present on how or whether to record their overtime hours and state the reasons for any changes.

Answer: Until February 26, 1992 job basis employees were instructed to account for at least their standard work schedule.

Instructions to job basis employees regarding the recording of overtime hours was not consistent throughout the various divisions. Since February 26, 1992 open range employees have not been required to record their hours worked. All other job basis employees record hours worked each day.

****

[Volume II, May 27, 1993]

[116]

THE COURT: Okay. We can get a copy made. Do you need it right this second? Are you ready to proceed?

MR. WHELAN: NO.

We're ready to proceed, your Honor. We would request that, if it would be helpful to the Court, that we present a brief opening statement to outline some areas of our testimony.

THE COURT: All right. That's fine.

****

[118]

MR. SCAROLA: Your Honor, if I may, from a procedural standpoint, I'm going to object to defense counsel making an opening statement at this point. I understand that the Court gave us those options at the outset of the case and

[119]

indicated that you didn't believe that it would be helpful to make opening statements.

THE COURT: Well, that's true, but I had the impression from what Mr. Whelan said--maybe I'm wrong--that there was something in particular--that Mr. Whelan didn't really want to make a full-fledged opening statement or that he wanted to orient me exactly to how his case is organized basically and to just highlight a couple of items perhaps.

MR. WHELAN: I think that's correct, your Honor.

THE COURT: Okay. Go ahead. Mr. Whelan.

MR. WHELAN: Thank you, your Honor.

As your Honor may know, the Fair Labor Standards Act is probably one of the most widely known, in some respects, laws. Everybody knows there's a minimum wage law, but there are also many fine points of the law. Salary basis regulation is one of them.

I am not going to present anything in this opening statement with respect to the County's position that we are not an employer. Those are the constitutionality issues that we have raised in our papers and we will raise those in our post-trial papers, the Court permitting.

However, it we are an employer, it is our burden to establish that we are exempt from the Fair Labor Standards Act overtime requirements.

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[124]

Now, the plaintiffs who we haven't seen, who are they? Well, they are high ranking officials of Broward County Government. In each case they meet the duties test. They are high ranking folks. Some of them make substantial amounts of money.

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[127]

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MR. SCAROLA: Excuse me, your Honor, I'm sorry to interrupt, but this is not an opening statement. This is legal argument and I do object to it.

I would ask that counsel confine himself, if the Court's going to permit an opening statement, to a recitation of what the facts in this case are expected to show from the defendant's perspective.

THE COURT: Well, let me just say this. I did read all the papers, but you did bring out some things that I was not aware of from the papers. So I appreciate that and it did help to orient me.

But now I'm not sure we're doing anything other than what's in the papers.

****

ROSENBERG - Direct

[152]

BY MR. WHELAN:

Q. Mr. Rosenberg, the initial question was whether you interpreted any of these policies to require deductions for exempt employees for partial-day absences.

A. Only under extraordinary circumstances.

Q. And what would those be?

A. Issues of job abandonment, for example, where an employee had unexcused absences and an exempt employee's performance was failing and discipline might be involved.

* * * *

[154]

BY MR. WHELAN:

Q. Mr. Rosenberg, again, when you first reviewed these rules in 1989, when you came to the County's employment, how did you interpret that policy?

First of all, let's take it in two steps--no, I'm sorry.

When you first came to the County in 1989, with respect to this policy's application to exempt employees, how did you interpret it?

A. That if a division director or a department director felt that tardiness meant that work was not being performed as needed, that disciplinary action, which could include deductions from pay, was possible, but that the schedules of exempt persons could be and were being flexed so that the concept of reporting to work at a certain time was not a mandate in the organization for these types of employees.

Q. At that time, back in 1989, did any of the job basis employees who reported to you arrive late from the regularly scheduled office hours?

A. Yes.

Q. Did you ever reduce their pay under this rule?

A. No.

Q. And why is that?

A. Because I was aware of the work performed by those

[155]
persons. I was aware of their exempt status. I was aware that they regularly worked considerably in excess of thirty-seven and a half hours a week and I didn't feel it was appropriate or consistent with our exemption policy to treat them as persons who will be docked for fifteen minutes if they showed up late on a particular day.

Q. Now, Mr. Rosenberg, if you could turn to the last page of this exhibit, which is numbered page 85 on the exhibit, and take your time, but review Section 118.16.

When you first came to the County in 1989 and you reviewed these rules, what was your understanding of the application of Section 118.16 to exempt employees who had a partial-day absence?

A. That it was within the discretion of the director involved to consider the circumstances of the request for time off and to flex the schedule of the person; that there was not precluded the deduction of time from leave banks.

Q. Did you yourself applying this policy ever reduce the compensation of an exempt employee for partial-day absence?

A. I did not in the sense of mandating a reduction. There clearly were employees in the Personnel Division and elsewhere who used leave time for periods of absence of less than a day. I am not aware of the docking of anyone's pay as a result of having no leave time, for example.

****

[160]

Q. Do you recall, as close as possible, in time when you learned of the Ninth Circuit decision in Abshire?

A. In 1990, probably late to middle 1990. I can't recall exactly when.

Q. The decision was issued in December of 1990, so is it your testimony that you were you aware of the Court's action or that case's existence before the Circuit Court's decision?

MR. SCAROLA: Objection, leading.

THE COURT: Sustained.

BY MR. WHELAN:

Q. Do you have any kind of precise recollection when you learned of the Abshire decision involving the Ninth Circuit?

A. Clearly after the appellate court decision, I believe, but I can't be specific on having a sense from the literature of something going on in that area of California around the Abshire facts.

****

[164]

By MR. WHELAN:

Q. I'm going to follow-up on that. But before I do, were you aware at that time of an Eleventh Circuit decision involving the salary basis test?

A. I believe you're referring to the Atlanta--a case coming from Atlanta?

Q. Yes.

A. Yes.

Q. Now, back in February of 1991 were you aware of the existence of that case?

A. I believe that I was from a following of the literature that I would have been doing.

* * * *

[170]
Q. You say that you didn't begin it as a three-year exercise. What was your initial time frame that you were going to go back and look at these records?
A. Well, we began with I believe a two-year target for search and we decided to extend that to a three-year.
Q. And why is that?
A. More comprehensive time period. We had now the mechanism and the experience in that record search to know how to do it. We just determined that that was feasible and appropriate.
Q. Why didn't you go back farther than three years?
A. We had no reason to think that the product we saw in three years would be substantially different in a longer search. We found what we regarded as a very small universe of examples of where pay had been docked. We found no other necessity of legal or policy based to go back beyond three years. We'd already invested a thousand hours of staff time in addition.
Q. All right. Once you determined that there had been some reduction in compensation or take-home pay for this group of people, what was done, if anything, by the County with respect to their pay?
A. We determined that it was appropriate to calculate the amount deducted from their wages, to include interest in

[171]
those calculations and to make whole the employees for those deductions.

* * * *

[196]
BY MR. SCAROLA:
Q. At no time prior to the most recent revisions

[197]
subsequent to the filing of this lawsuit did the Civil Service rules and regulations make any distinction between FLSA subject employees and FLSA exempt employees, correct?
A. You're correct.
BY MR. SCAROLA:
Q. Take a look at Defendant's Exhibit Number 45, if you would. It is the last page, page number 85, Section 118.16, absence without leave. Do you see that section now, sir?
A. I do.
Q. And during your direct examination, in testifying with respect to that section, you said that organizational heads had discretion in applying the provisions of that section. Do you remember that?
A. Yes.
Q. Is there anywhere, sir, in that document or someplace

[198]
else where it is written down that there is discretion as to whether that policy will or will not be followed?
A. Not written in the document.
Q. Is it written anyplace, anywhere at all? Is there some writing that you can point to that says that organizational heads can choose to follow this or not choose to follow this in their discretion?
A. No.
Q. All right, sir. Let's go on to the next question.
You told us that you were not aware that any exempt employee lost pay due to a partial-day absence before the filing of this lawsuit, correct?
A. Correct.
Q. But you knew that exempt employees regularly lost leave time due to partial-day absences, correct?

A. Correct.
Q. You knew that that was a widespread common practice and policy of Broward County, correct?
A. Correct

[199]
Q. And you also knew that the ultimate consequences of the loss of leave time could be the loss of money to employees, right?

MR. WHELAN: I'm going to object to the characterization of the term "loss of leave time." Employees are compensated from leave time.

THE COURT: It's overruled provided you understand the question. If you don't understand the question, I'm sure Mr. Scarola will be happy to restate it.

THE WITNESS: That outcome was hypothetically possible.
BY MR. SCAROLA:
Q. Did you ever make any effort to determine whether in fact that occurred?
A. The '83 pay period review in September '91 was an effort in that regard. Had people lost money due to a partial-day absence, it would have surfaced in that effort.
Q. Let's talk about what that effort related to and what it didn't relate to, Mr. Rosenberg. That effort attempted to identify where there was a loss of money as a consequence of a reduction in salary during a given pay period, correct?
A. Correct.
Q. Which loss resulted from a partial-day absence on the part of an exempt or ostensibly exempt employee, correct?
A. Correct.

[200]
Q. That effort did not include any effort to identify all of those individuals whose leave banks were debited as a result of partial-day absences, correct?
A. Correct.
Q. There was no effort whatsoever made to identify all of those people and all of those circumstances where there was a loss of leave time as a consequence of the debit to a leave bank because of a partial-day absence, correct?
MR. WHELAN: Object. Asked and answered and we don't contest that.
MR. SCAROLA: I'll accept the stipulation.
BY MR. SCAROLA:
Q. As a result of never having made such an effort, you don't know how many employees who retired between 1988 and the time this study was conducted were not paid the same severance benefits that they would have been paid had their leave banks not been debited as a consequence of partial-day absences, correct?
A. Correct.
Q. You don't known how many employees who terminated their employment between 1983 and 1988 were paid less money upon termination as opposed to retirement because they had less credit in their leave banks and could not convert leave they otherwise would have had to cash dollars, correct?
A. Correct.

****

ROSENBERG - Cross

[211]
Q. So it was your belief based upon what you saw for the three years that you examined that it was likely that what

[212]
occurred in the prior two years, between '86 and '88, was the same thing that was going on between '88 and the time that the review was conducted, correct?
A. That there would not be a substantial difference, yes.
Q. So that based upon the review that you did of the period from '88 to '91, you were satisfied that there were people who were also losing salary as a result of partial-day absences who were classified as job basis or FLSA exempt employees between '86 and '88, correct?
A. I did not reach that conclusion.
Q. Well, what do you mean when you testify then, sir, that you reached the conclusion that the same circumstance existed between '86 and '88 as existed from '88 to '91? You told us you assumed there wasn't any substantial difference.
A. I did not feel that it was necessary to go back earlier than 1988. We identified a number of cases, seventy-four total, I believe, in the three-year period.
Q. Excuse me, I don't believe you're being responsive to my question, Mr. Rosenberg.

* * * *

[213]
THE WITNESS: The period we covered was '88 through '91. We did not go back earlier than that and we did not go earlier because of knowledge that there were specific deductions. We just didn't feel it was necessary to go back.
BY MR. SCAROLA:
Q. Because you concluded that there would be no substantial difference in what you would find, correct?
A. I did not and do not believe that that's the -- that we would have found a substantial difference.
Q. So if you are telling us that you didn't believe there

would be any substantial difference and if you found a total of some three hundred instances of deductions on the part of exempt employees for partial-day absences, an average of a hundred a year, does that mean that you assumed that a hundred a year would have existed for '86 and '87 as well?

MR. WHELAN: Objection. I don't believe that there's any foundation for the figure being thrown out here.

THE COURT: Was that just a theoretical figure?

MR. SCAROLA: No, it was an actual figure.

BY MR. SCAROLA:

Q. But I'll be happy to make it easier for you, Mr. Rosenberg. Whatever the numbers were in '88 and '89 and '90 you assumed would have been the same for '86 and '87, correct?

[214]

A. We did not have reason to think otherwise.

Q. All right, sir. So you assumed then that there were at least some people in '86 and '87 who should have been paid, who weren't paid, but you chose to ignore it, right?

A. It was possible that there were.

Q. But you chose to ignore it.

A. Yes.

* * * *

[219]

Q. Yes, sir.

And all of those circumstances where there wasn't anything left in the leave bank to account for this partial-day absences, in accordance with the policy, practice and procedure of Broward County, the employee lost money.

MR. WHELAN: Objection. There's no foundation for establishing that there was ever a time when there

was nothing left in somebody's leave bank.

THE COURT: I'm going to overrule it and let you clear it upon on redirect.

THE WITNESS: If there had been a case where the salary of an exempt person was debited for less than a day, irrespective of the reason, that record would have been flagged.

BY MR. SCAROLA:

Q. All right, sir. But all of that was occurring in accordance with the policies, practices and procedures in Broward County that were then in existence, correct?

A. Correct.

THE COURT: So if someone took a part-day absence and they had no leave bank in which that part-day absence could be debited and they were out for two hours, they would receive a two-hour reduction in pay?

THE WITNESS: What you describe, your Honor, is

[220]

possible. There are also circumstances where a two-hour absence on a particular day would not be construed as time that would not be paid. It could be flexed. They might be absent--they might come in at ten o'clock on Monday--

THE COURT: Let me rephrase the question. With respect to the employees who you were able to identify who had had an actual reduction in pay on account of a part-day absence, did the reductions correspond to an hourly rate?

THE WITNESS: Yes. The pay back, for example, was based on that person's hourly rate times the number of hours for which they did not receive pay.

THE COURT: And were you able to determine or was it determined how it was that division heads were determining what the hourly rate of pay was for salaried employees who had been exposed to this kind of a reduction?

THE WITNESS: The salary would be expressed in an annual amount divided by 2,080 hours.

MR. WHELAN: Judge, I think it's important to point out here that this is all hypothetical. There's been nothing established that Mr. Rosenberg is aware of any circumstance where an employee had exhausted a leave bank. It's a very unlikely occurrence.

THE COURT: But we do know there are employees who had reductions in pay on account of part-day absences.

MR. WHELAN: Yes, but it may not be because leave

[221]
banks were exhausted.

THE COURT: Okay, that's fine. I don't think I even incorporated leave banks in my last question.

MR. WHELAN: I'm sorry. I thought yours were follow-ups to Mr. Scarola's question, which assumed that there was exhausted leave banks.

THE COURT: Okay. You said salaries expressed in how many hours?

THE WITNESS: 2,080 in the work year.

BY MR. SCAROLA:

Q. You didn't find, in connection with your investigation, that the reason why these folks didn't get paid what they were supposed to be paid was because there was some computer error, did you?

A. No.

Q. Or because some clerk copied something down wrong somewhere?

A. No.

* * * *

[226]
Q. And the basic distinction between those categories of employees as Broward County uses those categorizations is that hourly employees are subject to the overtime requirements of Fair Labor Standards Act, whereas job basis employees are not paid time and a half for hours in excess of forty hours during a given week, correct?
A. Correct.
Q. Now, in addition to those two categories, there is another categorization of employees utilized by Broward County, and they are known as open range employees, correct?
A. That is correct.
Q. And open range employees are in fact a subcategory of job basis employees, correct?
A. Also correct.
Q. Open range employees, they're the real executives in Broward County system, right?
BY MR. WHELAN: Objection. Judge, I think that's a complete mischaracterization.
MR. SCAROLA: Then the witness can tell me that and I don't need counsel to tell me that, you Honor.
THE COURT: It's overruled.
MR. SCAROLA: That's not a proper legal objection.

[227]
THE COURT: Go ahead.
THE WITNESS: Your question, I believe, was the open range people are the County's true executives.
BY MR. SCAROLA:
Q. Yes, sir.
A. And I think by implication you're saying that if you're not in the open range, you're not a true executive.
Q. Yes, sir.

A. The answer is no, that's not correct.
Q. Well, open range employees, they don't have to keep time records like the rest of the job basis employees, right?
A. That's correct.

[228]
BY MR. SCAROLA:
Q. Mr. Rosenberg, open range employees can come in at the time they choose without having to worry about punching a time clock when they come in, correct?
A. Correct.
Q. And, sir, open range employees, they are the higher-level administrators and professionals within Broward County, aren't they?
A. They are.
Q. Now, you signed answers to interrogatories propounded to you in this case. Do you remember that, sir?
A. Yes.

* * * *

[230]
Q. In December of 1989 there were 5,827 employees and the number of job basis employees had increased to 1,007, correct?
A. Correct.
Q. In December of 1990 total number of employees had gone up to 6,328; number of job basis employees, 1,093, correct?
A. Correct.
Q. In December of 1991, 6,312 County employees, 1,390 of whom were job basis employees, correct?
A. Correct.

Q. And in May of 1992 there were 6,218 total County employees with 1,361 of those being designated as job basis employees, meaning that 1,361 people weren't eligible to be paid overtime, correct?

A. Correct.

Q. Now, there are some numbers written on the side, handwritten on the side of that interrogatory, and we've done some calculations, and I want you to assume, so that we don't have to worry about doing the math right now, that those calculations are correct and reflect the percentage of job basis employees to total number of County employees, and assuming just for purpose right now--because we can do the math to confirm it if there's any question about it--but assuming that 947 is 17 percent of 5,640, and that 1,007 is 17.3 percent of 5,872, and 1,093 is 17.3 percent of 6,328

[231]

and 1,390 is 22 percent of 6,312, and 1,361 is 22 percent of 6,218, you would agree based on those assumptions, Mr. Rosenberg, that there has been a consistent trend in Broward County to designate more and more people both in terms of absolute numbers and percentages as exempt from the Fair Labor Standards Act, correct?

MR. WHELAN: Your Honor, we have an objection to the relevance of this line of questioning. The here is, of course, salary basis, not duties test.

THE COURT: It's overruled.

BY MR. SCAROLA:

Q. Is that correct, sir?

A. There clearly has been an increase.

Q. As a matter of fact, an increase of 30 percent between 1988 and 1992 in the number of chiefs as compared to Indians, right, sir?

MR. WHELAN: Objection to that

characterization.

THE COURT: It's overruled.

THE WITNESS: Assuming your math is correct--I will defer to that assumption, that your math is correct--the characterization I disagree with.

* * * *

[235]

Q. Are you aware that some managers did interpret the tardiness policy to require deductions for job basis employees?

A. Yes, I am.

MR. SCAROLA: Objection. Calls for hearsay, secondhand knowledge. To the extent the answer is in the record, I move that it be stricken.

THE COURT: What's the basis?

MR. WHELAN: I asked him if he's aware if that occurred.

THE COURT: I think you have to ask him how he's aware of that.

BY MR. WHELAN:

Q. Have you had occasion to examine whether some managers have interpreted the tardiness rule that required deductions for salaried employees?

A. I have.

Q. What have you learned?

MR. SCAROLA: Objection.

THE COURT: Well, what did you look at? Did you look at something or did you talk to people?

THE WITNESS: I reviewed the findings of that three-year study to note that some persons had been docked for absences related to tardiness.

* * * *

[238]

Q. Was there any cases that you know of in the study that was conducted where any employee had exhausted all of their leave?

A. No.

Q. In your experience with the County, have you ever faced a situation where any exempt employee had exhausted their leave banks and had taken a partial-day absence?

A. No, with one exception that I'd like to explain.

Q. Sure.

A. Your question was exhausted their leave bank, and there have been a couple of cases where an employee, due to extremely serious illness, has exhausted their leave banks, but we have a sick leave donation program in which colleagues can donate some of their leave.

* * * *

APPENDIX J

[ROSENBERG DEPOSITION TESTIMONY]
[October 27, 1992]

****

[20]
[BY MR. SCAROLA]

Q. Did you begin to follow the Abshire case as of the time of the District Court decision in Abshire?

A. It would have been very soon after that decision came that I would have, because Kern County was in the same geographic region of California as Stanislaus County was.

Q. And did that occur while you were still with Stanislaus County?

A. I do not recall being aware of Abshire in the final months of my Stanislaus County work.

Q. Your recollection then is it was very soon after you began with Broward County that you first began to follow the progress of the Abshire decision through the Courts?

A. Yes, certainly after the Appellate Court decision.

[21]

Q. Did you have discussions about Abshire with anyone within Broward County Government prior to late '90 or early '91 when you brought the Supreme Court's decision in Abshire to the attention of the County Administrator?

MR. WHELAN: Objection, there is no Supreme Court decision on Abshire.

Q. You've already told us that as you understand it, the Supreme Court denied certiorari in Abshire, correct?

A. The Supreme Court denied certiorari. I'm not familiar with their practice as to whether they took a five to four vote or any vote on that denial. I don't know how they do that.

Q. All right. Prior to bringing the Supreme Court action on Abshire to the attention of the County Administrator and discussing its potential implications for Broward County with the County Administrator, did you have any other discussions either with the County Administrator or any other Broward County employees about the implications of the Abshire decision?

A. It is likely that I would have had discussions describing the decision and sharing many articles or information from publications with several people.

[22]

Q. And who were the people with whom you would have likely spoken to?

A. Likely it would have been the various fellow professionals in the Personnel Division, perhaps with the Director of the County.

Q. Would you identify those individuals to whom you recall that you would have likely spoken to?

A. Well, my use of the word likely refers to the practice of sharing professional journal articles and information with a minimum, the section heads and the Personnel Division. They are or they were at that time for a number, Scott Bugg, who heads the Classification and Pay Section of personnel, Norm Sitter, who heads the Recruitment and Examinations.

MR. WHELAN: Wait a minute, are you answering this question in terms of who you did discuss Abshire with?

THE WITNESS: No, who I likely would have as part of the pattern of sharing generic information on relevance.

Norm Sitter, the Recruitment and Examination section head, James Acton, the Labor Relations section head, and Dorothy Cleveland, the Administrative Services section head in personnel.

[23]

Q. What did you personally understand the implications of Abshire to be?

MR. WHELAN: Objection to the extent it calls for a legal conclusion. You can go ahead and answer.

A. In the facts specific to the practices of Kern County one or more employees in the fire department with the rank that the county called Battalion Chief were considered by the county to be exempt from the Fair Labor Standards Act, and I believe that the nature of the facts there was that one or more of those Battalion Chiefs was subject under county policy to deductions from salary and that the issue in that Circuit and that District was whether that invalidated the exemption for that type, that classification of employee.

Q. Subject to deductions, for what reason, for partial day absences?

A. For partial day absences.

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[70]

[BY MS. CARTER]

Q. Specifically with reference now to paid leave, what kind of paid leave qualify in your mind as fringe benefits?

MR. WHELAN: Objection, asked and answered.

Q. Answer the question.

A. All forms of paid leave.

Q. Such as?

A. Military leave, annual leave, job basis leave, personal days, holidays, educational leave.

Q. Would sick leave also qualify?

A. Definitely.

Q. When a Broward County employee leaves their employment for whatever reason, if they have accrued sick leave hours, what happens, do they get

[71]
paid for that?

A. Within certain limits. Departing county employees are compensated for a portion of accrued but unused sick leave.

Q. Do you know what the portion is?

A. It varies depending on the reason for departure. But in general, for a resignation, it's 25 percent, up to 25 percent of the value of accrued unused time, up to 960 hours I believe of accrued time on retirement, if that's the reason for separation, percent of value received back on separation is 50 percent.

Q. If the departing employee had accrued annual leave hours, what would be the treatment of those accrued annual leave hours?

A. The employee would receive cash equal to the value of the hours of accrued but unused annual leave up to a maximum and I believe it's 240 hours.

****

[74]

Q. That job basis employee would still have to reduce a leave bank for a partial day absence?

A. No, not necessarily. In other words, a person out for less than -- an exempt person out for less than a day would not have their property, if you want to think of it that way, reduced. Their property includes entitlement to their salary level and their accrued leave banks.

[75]

As I understand it, the overwhelming practice in Broward County was not to deduct leave, not to deduct time salary, not to take the property, if you want to phrase it that way, from exempt employees who are absent for less than a day.

Q. It was the overwhelming practice in Broward County for what time period?

A. I would say for the prior three years.

Q. So your testimony today is that from 1989 until today, that job basis employees who work for Broward County were not required to reduce their sick leave or annual leave if they were absent for part of the day?

A. Let me try to be extraordinarily clear here. I hope I'm succeeding. I believe from what research we've done, overwhelmingly people did not lose salary. I believe further that our practice was that if a person wanted to take time off and came forward and said I want to take time off today and I want to charge it to leave time, that was allowed, but I do not believe the practice was to take leave time without the permission of the employee.

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[79]
*** why would a job basis employee if they didn't' have to reduce their leave bank for a partial day absence, why would they do it?

A. I can share with you why I would do it.

Q. Why would you do it?

A. In fact, I believe I did that today for a subsequent half a day off. There are times when I as a matter of personal preference choose to be on official time off rather than to simply be in a status where my pay is now subject to docking. It's a matter of my personal discretion and choice. I know full-well that I don't have to do that.

Q. How do you know that you didn't have to do that?

A. Because in my opinion, the policy of the county and the overwhelming practice was not to make deductions for absences less than a day from an exempt person.

Q. When you use the terms deductions, we're talking about deductions from leave bank?

A. My salary.

Q. We're talking about deductions from leave banks specifically for partial day absences?

A. Okay.

Q. Your testimony is that in the prior three

[80]
years, it has not been the policy or practice in Broward County that job basis employees were in fact reduced their leave banks for partial day absences?

MR. WHELAN: Objection to the form.

Q. Was the practice in fact -- Read back the question.

(Thereupon, the court reporter read back the requested question, after which the following proceedings took place.)

A. To the best of my recollection, our overwhelming practice was not to take the property of an individual away from them to include leave banks, but that didn't mean it was not allowable to be done if I was the moving party, and in fact, I personally have chosen to have some absences of less than a day charged against leave time. That's my recollection.

Q. So it's your understanding that any job basis employee who worked for Broward County in the past three years had the total discretion as to whether they were going to reduce their leave bank for a partial day absence?

A. No. The use of leave time doesn't involve the total discretion on the part of the employee to say, well, thank you, I'm leaving now. The use of leave banks is something submitted on a request for

[81]

approval form, and it's reviewed by management. The granting of time off is discretionary.

Q. Assuming that there was no scheduling problem, is it your testimony that job basis employees in Broward County could put in a request form for partial day absence and not have to charge that time to a leave bank?

A. And be absent and not have their salary docked, yes.

Q. We're specifically talking about reducing leave banks.

A. I believe that the practice was not to mandate a deduction from leave banks.

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[101]

Q. Your prior testimony was that since the mid-70's you have known that the Department of Labor Guidelines contained both job duties and salary basis test?

A. That's correct.

[102]

Did you ever specifically do a review of how the county treated partial day absences for job basis employees specifically to see if it complied with that salary basis test?

A. Did I? The answer is no, prior to the events that bring us together here.

Q. So when you began your employment with Broward County and you testified that one of the things you did was to review the civil service rules and regulations; is that correct?

A. That's correct.

[103]

Q. When you reviewed the civil service rules and regulations, when you began your employment with Broward County, was there a specific section in those rules and regulations that address the salary basis test as you understood that test?

A. I do not believe there was.

[SCOTT BUGG DEPOSITION]
[November 19, 1992]

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[pp. 12-14]
[BY MR. SCAROLA]

Q. Do you remember what your understanding was of what the civil service rules and regulations called for with respect to the treatment of partial day absences.

MR. WHELAN: This is in 1977?

Q. In 1977; it that correct?

A. At that time, I believe that there was if you were --

MR. WHELAN: This is your recollections from then?

A. This is my recollection, right. My recollection from then is that if someone was out for an hour, they would take an hour of leave or flex their schedule.

Q. Now, I understand what you mean when you talk about taking an hour of leave. What do you mean when you refer to flexing their schedule?

A. Flexing the schedule would be changing the schedule. In other words, let's say someone came in at 9:30 instead of 8:30, they could flex their schedule with an additional hour of work, working through lunch or staying until 6:00 at night.

Q. Would that need to be done on the same day in which the partial day absence occurred, that is if you came in an hour late, even Tuesday, you needed to stay an hour late on Tuesday or work through your lunch hour on Tuesday in order to compensate for the time that was missed?

A. Same day.

Q. What were the consequences of failing to debit your leave bank or flex your schedule as you've described

where a partial day absence occurred?

A. I don't think I quite know what you mean when you say consequences.

Q. Well, if you didn't make up for the time that you lost by being absent a partial day, either by working late on that same day or by deducting from an available leave bank, what happened?

MR. WHELAN: Objection, hypothetical.

Q. As you understood it.

A. As I understood it, the person would not be paid.

Q. Now, do you have any recollection of any of those things actually happening to you back during this period in 1977, that is, do you have any recollection of your having a partial day absence and either being required to make it up by working late on the same day or alternatively having to go debit a leave bank or alternatively having to lose pay?

A. Yes.

Q. Do you recall the specific incident, or do you just remember that it did occur?

A. I would just remember that it did occur.

Q. Do you have any recollection as to the frequency with which it occurred, that is, whether it happened more than one time, and if so, approximately how many times in the early part of your work history as a job basis employee?

A. My recollection would be that if I had a partial day absence, it might be a doctor's appointment or a dental appointment, I was never docked for any time.

Q. You would either work late on that same day in order to make up for it or you would debit leave banks?

[15]

A. Yes.

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[pp. 17-19]

A. At a later point and time, yes, I did have concern. I can't say that I did have that concern in 1977.

Q. All right. Have you continuously since September of 1977 been classified as a job basis employee?

A. Yes.

Q. Did your understanding of Broward County's policies, practices, or procedures with regard to partial day absences ever change since September 1977 from that which you have already described in your testimony?

A. Yes.

Q. When is the first time that your understanding differed in any respect at all from what you have just described to us?

A. I would estimate roughly in 1980 or 1981.

Q. Okay. Tell me what happened in 1980 or 1981 that resulted in some change in your understanding of Broward County's policies, practices, or procedures as they related to handling partial day absences for job basis employees.

A. As far as my own opinion, I developed some philosophical concerns from an equity standpoint that county policy was -- you could work a 12 or 13 or 14 hour day and come in an hour late the next day and need to charge that hour to leave.

Q. Were there particular circumstances that gave rise to that philosophical concern?

A. The circumstances were probably two circumstances. One was that it was becoming common in regard to labor negotiations and the budget cycle which

overlapped typically for the last two months or three months of the fiscal -- Well, end of the fiscal year. The other circumstance was it became known to me that there were equivalent jobs to mine elsewhere in the organization that were being paid overtime.

Q. All right. Let's separate those out and talk first about the circumstances where labor negotiations and budget concerns resulted in 12 and 13 hour days. Did you express the concern arising from those circumstances to anyone?

A. I'm sure that I did.

Q. To whom did you speak?

A. I expressed that concern to John Curry. I expressed that concern to Sandy Von Staden who had a similar concern, and I expressed that concern to Vivian Paulson, and beyond that, I can't recall anyone specifically.

Q. Do you remember chronologically who you spoke to first of those three names you can remember?

A. No.

Q. Let's just take them then in the order in which you've identified them. And as best you can recall, tell me what you talked to John Curry about. First of all, was Mr. Curry still in a position of Personnel Manager at the time that you spoke to him?

A. Personnel Director. I don't recall what I specifically said to him, but I'm sure that I did express the gist of the thought.

Q. That it was unjust, it seemed inequitable to you, that you ought to have to work long days of overtime and then if you came in late the following day that you would be docked leave time for coming in late the following day, is that generally the gist of your concern?

A. Yeah, I think the way that I would say that is that I questioned the equity, not especially for myself in particular, but myself and others in view of the entire situation

and people in other areas.

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[pp. 48-50]

Q. All right. Let's go back then to prior to November of 1992.

A. Okay.

Q. Prior to the beginning of that month, what was your understanding of the salary basis test as it relates to partial day absences.

MR. WHELAN: Objection, calls for a legal conclusion.

A. My understanding was that the exempt employee should not be docked for partial day absences.

Q. And did that include a prohibition against reducing the individual's pay as well as reducing the individual's accrued leave time?

A. My understanding, yes.

Q. Have you ever heard of the Abshire decision?

A. Yes.

Q. Do you recall when and under what circumstances you first heard of the Abshire decision?

A. Probably either when it was in the news pending or after a determination had been made, Abshire versus Kern County, which I believe was November or December of 1990.

Q. What did you understand the issues to be in the Abshire case?

MR. WHELAN: Objection, calls for a legal conclusion.

A. And this is not necessarily the understanding that I had right at that time when I first became aware of it, but my understanding was that they had designated a, I believe it was a battalion chief position as executive exempt

from FLSA. and that there was a disagreement with that treatment of the employee based on their duties and responsibilities.

Q. Do you recall whether Abshire had anything to do with the issue of partial day absences?

A. Yes, I believe I did.

Q. And that one of the issues framed in that case was whether an exemption could be maintained in light of a policy, practice, or procedure to reduce an individual's pay or leave time based on partial day absence, correct?

MR WHELAN: I want to object to the question on the basis that it calls for a legal conclusion and this whole line of questioning is based on an interpretation of a decision that has been a published decision. All these questions I'm going to object on a continuing basis to any interpretation of Abshire.

Q. (By Mr. Scarola) Do you remember the question?

A. Yes, and yes.

Q. Did you have an awareness that that issue was addressed in the Abshire case back at the time of the Abshire decision?

A. I believe I did, but I can't say for sure.

Q. And is it your belief that the Court in Abshire decided that exemption from the overtime requirements of the Fair Labor Standards Act was lost if an employee was docked pay or leave for a partial day absence?

MR. WHELAN: Objection calls for a legal conclusion. It's not the correct holding of the case. If you have an opinion, whatever. I object to the question, it's inaccurate, and it calls for a legal conclusion.

A. In that case, that is an interpretation that I'm aware of, yes.

Q. And is it the interpretation that you were aware of back in 1990?

A. Yes, I believe it was.

Q. In fact, did you discuss those matters with Mr. Rosenberg back in 1990?

A. Yes.

[DEPOSITION OF JAMES ACTON]
[November 20, 1992]

****

[4]
[BY MS. CARTER]

Q. As a Labor Relations Officer with Broward County, what are your duties basically?

A. I'm responsible for supervising a section in the personnel division, which includes myself and three and a half professional staff and a secretary. And we're responsible for dealing with grievances, disciplinary actions, performance appraisal system. We negotiate labor contracts, administer the labor agreement.

****

[6]

Q. During what period of time were you yourself a job basis employee while you worked for Broward County?

A. I can only say from mid to late '86 through the present time.

****

[10]

Q. As a job basis employee, who reported to Phil Rosenberg? Did you ever have occasion to take part of a day off?

A. What do you mean by that?

Q. What are your regularly scheduled hours?

A. 8:30 to 5:00 with an hour for lunch between 12:00 and 1:00.

Q. Is that personal preference that you take lunch at 12:00.

A. Basically, yeah, that's true.

Q. So it's not an operational requirement that you take lunch at 12:00?

A. That's true.

Q. If you needed to go to the doctor in the morning and came in at 10:30, what would you do about that partial day absence in recording the time on your time sheet?

A. Well, my time sheet would have reflected sick leave for the hour that I wasn't there or hour and a half whatever it is.

Q. Why would you have recorded it as sick leave?

A. Because I was out to go to the doctor.

Q. If you needed to pickup a friend at the airport and came in at 10:30, how would you reflect

[11]

that on your time sheet?

A. Annual leave.

Q. Have you ever as a job basis employee who reported to Phil Rosenberg ever not recorded on your time sheet for partial day absence?

A. No.

Q. Was it your understanding that you have a discretion as to whether or not you needed to record your partial-day absence to a leave bank?

A. Say that again please?

Q. Was it your understanding that you had the discretion as to whether or not to charge that partial day bsence to a leave bank?

A. No.

[12]

Q. So if your normal working hours were 8:30 to 5:00 and you came in at 9:30 and worked until 6:00, you would not record that hours lateness in the morning as to any

accrued leave bank?

A. If I had my supervisor's permission to adjust my schedule that day.

Q. When did Phil Rosenberg begin to be your supervisor?

A. When he was hired.

Q. And do you know what year that was?

A. Time flies. I can't remember whether it was two or three years ago.

Q. During that time period, did Phil Rosenberg ever indicate to you that you had the option of charging partial day absence to a leave bank?

A. No.

APPENDIX K

FLSA 1988 PAYOUT

(June 18 - December 31)

NAME	SSN	DATE(S)	HOURS	PAY RATE	AMOUNT	TOTAL DUE
Albassan, Hayteem	[ ]	08/16	2.00	$14.0942	$28.19	$28.19
Boome, Ruby	[ ]	06/30	4.00	$8.0058	$32.02	$32.02
Brown, Diane	[ ]	8/15	0.50	$21.1356	$10.57	
		11/24	4.00	$21.1356	$84.54	$95.11
Davis, Alpheus	[ ]	06/26	6.00	$15.4177	$92.51	$92.51
Evans, Samuel	[ ]	07/20	4.00	$15.6197	$62.48	$62.48
Garcia, Caridad	[ ]	09/16	2.00	$14.3173	$28.63	$28.63
Genovese-Shulman,	[ ]	08/12	4.00	$14.2447	$56.98	
Cynthyia		09/19	2.5	$14.2447	$35.61	
		10/17	2.5	$14.7433	$36.86	
		11/16	4.5	$14.7433	$66.34	
		11/15 -11/18	7.00	$14.7433	$103.20	
		11/21-11/23	6.00	$14.7433	$88.46	
		12/11-12/24	1.5	$14.7433	$22.11	$409.57
Payne, Lillian	[ ]	10/08	3.00	$9.8495	$29.55	$29.55
Peacock, Kateryn	[ ]	10/20	3.00	$13.0305	$39.09	
		10/24	3.00	$13.0305	$39.09	

		10/27 -10/29	3.00	$13.0305	$39.09	
		11/14	3.00	$13.0305	$39.09	
		11/28	4.00	$13.0305	$52.12	$208.49
Reynolds, Marie	[ ]	12/23	1.00	$32.2505	$32.25	
		12/7, 12/8, 12/9	7.00	$32.2505	$225.75	$258.00
Richter, Mary	[ ]	6/12-6/25	3.00	$14.9567	$44.87	$44.87

EMPLOYEE TOTAL 11 TOTAL HOURS 80.50 1988 TOTAL DUE: $1,289.42

FLSA 1989 PAYOUT

(January 1 - December 31)

NAME	SSN	DATE(S)	HOURS	PAY RATE	AMOUNT	TOTAL DUE
Hudson, Mary	( )	11/07/89	4.00	$11.3469	$45.23	
		11/13/89	3.00	$11.3469	$33.92	$79.15
Hammond, Lynda	( )	03/01/89	4.00	$12.0006	$48.00	
		06/11/89	1.50	$13.2202	$19.83	
		09/03/89	4.00	$13.2202	$52.88	
		09/16/89	1.25	$13.2202	$16.53	
		09/23/89	4.00	$13.2202	$52.88	
		10/28/89	0.75	$13.7490	$10.31	$200.43
Evans, John	( )	07/27/89	0.25	$12.6000	$3.15	
		10/06/89	1.25	$13.0865	$16.36	
		PPE 11/11/89	3.25	$13.0865	$42.53	
		12/02/89	0.50	$13.0865	$6.54	
		12/14/89	2.00	$13.0865	$26.17	$94.75
Francis, Fay	( )	10/30/89	0.25	$16.7458	$4.19	$4.19
Feinberg, Susan	( )	07/10/89	1.00	$10.5859	$14.59	
		09/02/89	4.00	$10.5859	$42.34	
		PPE 12/09/89	3.00	$11.0093	$33.43	$85.96
Campbell, Kathleen	( )	PPE 06/24/89	1.00	$12.3407	$12.34	$12.34
Payne, Lillian	( )	PPE 06/24/89	2.00	$10.3481	$20.70	$20.70
Lundeen-Hall, Lorri	( )	05/22/89	2.00	$13.7600	$27.52	

		05/24/89	1.00	$13.7600	$13.76	
		05/25/89	1.00	$13.7600	$13.76	
		05/30/89	1.00	$13.7600	$13.76	
		05/31/89	1.00	$13.7600	$13.76	
		06/01/89	2.00	$13.7600	$27.52	
		06/05/89	1.00	$13.7600	$13.76	
		06/07/89	1.00	$13.7600	$13.76	
		06/09/89	1.00	$13.7600	$13.76	
		06/14/89	3.00	$13.7600	$41.28	
		06/15/89	2.00	$13.7600	$27.52	$220.16
McAllister, William	( )	07/28/89	6.00	$17.8447	$107.07	
		07/31/89	5.00	$17.8447	$89.22	
		08/02/89	3.00	$17.8447	$53.53	
		08/19/89	6.00	$17.8447	$107.07	
		08/23/89	1.00	$17.8447	$17.84	
		08/25/89	4.00	$17.8447	$71.38	
		08/30/89	6.00	$17.8447	$107.07	
		08/31/89	3.00	$17.8447	$53.53	
		09/01/89	3.00	$17.8447	$53.53	$660.25
Veshinski, Sloane	( )	02/16/89	1.00	$8.9231	$8.92	
		07/05/89	0.75	$10.0758	$7.56	
		08/22/89	0.25	$10.0758	$2.52	
		PPE 10/28/89	1.25	$10.4788	$13.10	$32.10
Rich, Jerry	( )	08/17/89	1.50	$14.3104	$21.47	
		09/22/89*	2.00	$14.3104	$28.62	$50.09
Reynolds, Nuala	( )	PPE 09/02/89	6.00	$11.1438	$66.86	$66.86
Geberer, Tobi	( )	PPE 10/28/89	1.00	$19.7425	$19.74	
		11/01, 04/89	3.00	$19.7425	$59.23	$78.97

Kalin, Jack	( )	12/15/89	4.00	$13.4403	$53.76	$53.76
Reynolds, Marie	( )	PPE 03/04/89	20.00	$32.2505	$645.01	
		03/18/89	2.00	$32.2505	$64.50	$709.51
Arthy, Maria	( )	11/01/89	3.00	$11.5896	$34.77	$34.77
Liams, Anne	( )	07/17/89	3.00	$13.6904	$41.07	$41.07

Employee Total 17 Total Hours 142.75 1989 TOTAL DUE: $2,445.01

FLSA 1990 PAYOUT

(January 1 - December 31)

NAME	SSN	DATE(S)	HOURS	PAY RATE	AMOUNT	TOTAL DUE
Pocock, Leonard	( )	8/27/90	2.00	$21.0213	$42.04	
		10/22, 23/90	10.00	$22.5976	$225.98	$268.02
Francis, Fay	( )	1/08/90	0.25	$16.7458	$4.19	
		3/28/90	0.25	$16.7458	$4.19	
		4/12/90	0.25	$16.7458	$4.19	
		4/26/90	0.25	$16.7458	$4.19	
		5/08/90	0.25	$18.0334	$4.51	
		6/01/90	0.25	$18.0334	$4.51	
		7/05/90	0.50	$18.0334	$9.02	
		7/16/90	0.25	$18.0334	$4.51	
		7/23/90	0.25	$18.0334	$4.51	
		7/31/90	0.25	$18.0334	$4.51	
		8/23/90	0.50	$18.0334	$9.02	
		9/13/90	0.25	$18.0334	$4.51	
		9/24/90	0.25	$18.0334	$4.51	
		PPE 10/27/90	0.50	$19.5206	$9.76	
		11/02/90	0.25	$19.5206	$4.88	$80.98
Ross, Stuart	( )	11/29/90	0.25	$13.4403	$3.36	$3.36
Husby, Kathryn	( )	2/14/90	0.25	$19.0445	$4.76	$4.76
Anthony, Juanita	( )	9/24/90	0.25	$17.1645	$4.29	$4.29
Eichner, Shelly	( )	9/19/90	7.00	$17.4362	$122.05	$122.05

Groves, Roy —	( )	1/29/90	4.00	$33.4553	$133.82	
		2/06/90	2.00	$33.4553	$66.91	
		3/15/90	2.00	$33.4553	$66.91	
		3/23/90	4.00	$33.4553	$133.82	
		3/26/90	4.00	$33.4553	$133.82	$535.28
Riveria, Manuel	( )	2/5,7,9,12,16				
		16/90	6.00	$14.9899	$89.94	
		PPE 3/03/90	6.00	$14.9899	$89.94	
		PPE 3/17/90	6.00	$14.9899	$89.94	
		3/17, 21, 23, 26				
		28, 30/90	6.00	$14.9899	$89.94	
		4/2-6, 9/90	6.00	$14.9899	$89.94	
		4/16, 18, 20, 23				
		25, 29/90	6.00	$14.9899	$89.94	
		4/30/90	1.00	$14.9899	$14.99	
		5/2, 4, 7, 9,				
		11/90	5.00	$14.9899	$74.95	
		5/16, 18, 21,				
		23, 25/90	6.00	$14.9899	$89.94	
		5/30/90	1.00	$14.9899	$14.99	
		6/1, 4, 6, 8/90	5.00	$14.9899	$74.95	
		PPE 6/23/90	6.00	$14.9899	$89.94	
		PPE 7/07/90	6.00	$14.9899	$89.94	
		7/9-11, 16,				
		17, 20/90	6.00	$14.9899	$89.94	
		7/23-25, 30				
		31/90	5.00	$14.9899	$74.95	
		8/01/90	1.00	$14.9899	$14.99	$1,169.21
Symonette, Earl	( )	11/15/90	5.00	$15.9390	$79.70	$79.70
Ford, Albert	( )	8/27/90	1.00	$15.5867	$15.59	$15.59

Torak, Cherry	( )	4/09/90	2.50	$13.7763	$34.44	
		8/01/90	2.00	$13.7763	$27.55	
		8/17/90	1.00	$13.7763	$13.78	$75.77
Chatham, Maria	( )	PPE 9/27/90	5.50	$31.4639	$173.05	
		PPE 10/03/90	7.00	$31.4639	$220.25	
		PPE 11/24/90	4.00	$31.4639	$125.86	$519.15
Steiden, Diane	( )	PPE 7/07/90	1.00	$10.4788	$10.48	$10.48
Lieberman, Andrea	( )	4/18/90	2.00	$11.0093	$22.02	
		4/19/90	2.00	$11.0093	$22.02	$44.04
Perr, Catherine	( )	10/20, 27/90	5.50	$6.8763	$37.82	$37.82
Howell, Arthur	( )	4/23/90	5.00	$8.6174	$43.09	$43.09
Coleman, Annie	( )	PPE 10/27/90	3.00	$10.4788	$31.44	$31.44
Dooling, Brenda	( )	2/21/90	5.00	$10.4788	$52.39	$52.39
Sola, Arturo	( )	1/31/90	1.25	$11.8559	$14.82	
		2/20/90	0.50	$11.8559	$5.93	
		3/26/90	0.50	$11.8559	$5.93	
		4/16/90	1.00	$12.4562	$12.46	
		PPE 5/26/90	0.50	$12.4562	$6.23	
		5/30/90	0.50	$12.4562	$6.23	
		6/09/90	2.00	$12.4562	$24.91	
		7/24/90	0.50	$12.4562	$6.23	
		7/26/90	0.50	$12.4562	$6.23	
		7/27/90	0.50	$12.4562	$6.23	
		7/16, 17, 19/90	2.00	$12.4562	$24.91	
		8/07/90	2.50	$12.4562	$31.14	

		8/22/90	1.00	$12.4562	$12.46	
		9/10/90	0.50	$12.4562	$6.23	
		10/12/90	0.50	$12.4562	$6.23	
		10/25/90	0.50	$12.4562	$6.23	
		11/08/90	2.00	$12.4562	$24.91	
		12/05/90	0.50	$12.4562	$6.23	$213.52
Hammond, Lynda	( )	1/06/90	2.50	$13.7490	$34.37	
		8/06/90	0.75	$14.1464	$10.61	
		8/19/90	2.75	$14.1464	$38.90	
		9/4, 9, 10/90	1.75	$14.1464	$24.76	
		9/26/90	6.00	$14.1464	$84.88	
		10/01/90	0.50	$14.1464	$7.07	
		10/12/90	0.50	$14.1464	$7.07	
		12/01/90	0.50	$14.1464	$7.07	
		12/03/90	0.50	$14.1464	$7.07	$221.81
Muccino, Margo	( )	1/19/90	0.50	$16.0994	$8.05	$8.05
Dennis, Chevella	( )	2/20/90	0.50	$12.4562	$6.23	
		8/21/90	0.50	$13.0865	$6.54	
		10/12/90	0.50	$13.0865	$6.54	
		10/19/90	0.50	$13.0865	$6.54	
		12/01/90	0.50	$13.0865	$6.54	$32.40
Steward, Cornell	( )	1/26, 30/90	1.50	$10.4788	$15.72	
		2/15/90	0.25	$10.4788	$2.62	
		3/13/90	1.50	$10.4788	$15.72	
		4/03/90	1.75	$11.0093	$19.27	
		4/15/90	0.50	$11.0093	$5.50	
		5/23/90	1.25	$11.0093	$13.76	
		6/21/90	0.50	$11.0093	$5.50	
		PPE 9/15/90	1.50	$11.0093	$16.51	

		10/22, 23/90	2.00	$11.0093	$22.02	$116.63
Franks, Marilyn	( )	4/16/90	0.75	$11.8559	$8.89	
		4/30/90	0.50	$11.8559	$5.93	
		6/28/90	0.75	$11.8559	$8.89	
		7/02/90	0.75	$11.8559	$8.89	
		8/22/90	1.00	$11.8559	$11.86	
		8/29/90	1.00	$11.8559	$11.86	
		10/08/90	0.50	$11.8559	$5.93	
		10/12/90	0.50	$11.8559	$5.93	
		10/22/90	0.50	$11.8559	$5.93	$74.10
Veshinski, Sloan	( )	4/06/90	1.25	$11.0093	$13.76	
		5/29/90	0.50	$11.0093	$5.50	
		6/21/90	0.75	$11.0093	$8.26	
		7/06/90	1.00	$11.0093	$11.01	
		7/16/90	0.75	$11.0093	$8.26	
		8/13/90	0.50	$11.0093	$5.50	
		8/24/90	1.00	$11.0093	$11.01	
		10/01/90	1.00	$11.0093	$11.01	
		10/02/90	1.00	$11.0093	$11.01	
		10/08/90	0.50	$11.0093	$5.50	
		PPE 10/27/90	3.00	$11.0093	$33.03	$123.85
Evans, John	( )	4/26/90	4.00	$13.7490	$55.00	
		7/16/90	1.00	$13.7490	$13.75	
		9/27/90	0.50	$13.7490	$6.87	
		10/04/90	1.00	$13.7490	$13.75	
		11/08/90	0.75	$13.7490	$10.31	
		11/20/90	0.75	$13.7490	$10.31	$109.99
Hudson, Mary	( )	1/2, 3/90	2.25	$13.7490	$30.94	
		8/07/90	1.00	$14.1464	$14.15	

		8/09/90	1.00	$14.1464	$14.15	
		9/4, 13/90	5.00	$14.1464	$70.73	
		9/26/90	0.50	$14.1464	$7.07	
		10/24/90	0.75	$14.1464	$10.61	$147.64
McCormick, Allen	( )	8/01/90	0.50	$10.4788	$5.24	$5.24
Delio, Nancy	( )	1/10/90	7.00	$14.1464	$99.02	$99.02
Scott, Ida	( )	4/23/90	4.00	$17.4362	$69.74	$69.74
Bowman II, James	( )	12/14/90	1.50	$11.3017	$16.95	
		12/20/90	1.00	$11.3017	$11.30	$28.25
Malkus, Charles	( )	7/30/90	0.50	$13.9197	$6.96	
		8/06/90	0.50	$13.9197	$6.96	$13.92
Nickles, Sarah	( )	6/25/90	5.00	$12.8987	$64.49	$64.49
Williams, Annie	( )	3/12/90	3.00	$14.9588	$44.88	$44.88
Kutolowski, Terrence	( )	2/28/90	0.50	$19.900	$9.95	
		3/02/90	0.50	$19.900	$9.95	$19.90
Peterson, Jerry	( )	6/06/90	1.00	$10.2434	$10.24	
		6/29/90	1.00	$10.2434	$10.24	$20.49
Feeley, Jane	( )	11/26/90	5.50	$16.7852	$92.32	$92.32
Ruovomaki, Connie	( )	11/02/90	2.75	$9.7499	$26.81	$26.81
Wilson, Irving	( )	2/01/90	2.50	$11.8793	$29.70	$29.70

Cardenas, Ofelia	( )	PPE 10/27/90	2.00	$11.5667	$23.13	$23.13
Rahill, Guitele	( )	10/12/90	2.00	$11.5667	$23.13	$23.13
White, Bruce	( )	12/26/90	1.50	$10.4788	$15.72	
		1/03/90	0.25	$10.4788	$2.62	
		1/16/90	1.75	$10.4788	$18.34	
		PPE 2/03/90	0.75	$10.4788	$7.86	
		2/14/90	3.00	$10.4788	$31.44	
		2/19/90	0.50	$10.4788	$5.24	
		2/20/90	0.50	$10.4788	$5.24	
		2/23/90	5.00	$10.4788	$52.39	
		3/02/90	3.00	$10.4788	$31.44	
		4/5, 6/90	3.00	$10.4788	$31.44	
		5/17/90	2.00	$10.4788	$20.96	$222.67
Ramos, Margarita	( )	6/09/90	4.00	$13.0865	$52.35	$52.35
Albassam, Haythem	( )	PPE 3/03/90	6.00	$15.9390	$95.63	
		3/26/90	1.00	$15.9390	$15.94	
		3/27/90	2.00	$15.9390	$31.88	
		4/26/90	4.00	$15.9390	$63.76	
		PPE 11/24/90	1.00	$15.9390	$15.94	
		12/06/90	3.00	$15.9390	$47.82	$270.96

Total Employees	44	Total Hour	335.50	1990 Total Due	$5,252.43

ANTHONY, JUANITA		OFF MGT SERVICES	AUDITOR II	E
[ ]	6/4/91	0.25 hrs.	$18.4840	$4.62
			TOTAL =	$4.62

BAPTISTE, JOHN		MENTAL HEALTH	SW II	E
[ ]	8/28/91	0.50 hrs	$11.0093	$5.50
			TOTAL =	$5.50

BOWMAN, JAMES III		HUMAN RELATIONS	HUM REL SP II-T	E
[ ]	2/1/91	1.00 hrs.	$11.3017	$11.30
			TOTAL =	$11.30

BULLER, ROBIN		OFF HOUSING FINANCE	HFA DEV COOR I	E
[ ]	6/4/91	2.00	$14.6686	$29.34
			TOTAL =	$29.34

CARRASQILLO, GREGORIO		MENTAL HEALTH	SW II	E
[ ]	7/23/91	4.00	$12.4562	$49.82
			TOTAL =	$49.82

CURRIE, MARILYN		ALCOHOL/DRUG	SAS II	E
[ ]	8/21/91	7.OO hrs	$14.8526	$104.04
			TOTAL =	$104.04

DONSKY, ELLIS		OES-ENV. ENGINEERING	WATER RES MGR	E
[ ]	PPE 8/17/91	1.00 hrs	$19.4978	$19.50

				TOTAL =	$19.50
EVANS, JOHN			MENTAL HEALTH	SW II	E
[ ]		1/16/91	0.25 hrs	$13.7490	$3.44
		1/29/91	1.00 hrs	$13.7490	$13.75
		2/12/91	3.00 hrs	$13.7490	$41.25
	PPE	2/16/91	2.00 hrs	$13.7490	$27.50
		3/27/91	0.50 hrs	$13.7490	$6.87
		3/28/91	3.00 hrs	$13.7490	$41.25
		4/4, 8, 10/91	2.25 hrs	$14.1464	$31.83
		5/20/91	0.75 hrs	$14.1464	$10.61
		5/30/91	1.00 hrs	$14.1464	$14.15
				TOTAL =	$190.64
FRANCIS, FAY			OFF MGT SERVICES	AUDITOR III	E
[ ]		1/10/91	0.25 hrs	$19.5206	$4.88
		1/28/91	0.25 hrs	$19.5206	$4.88
		2/07/91	0.25 hrs	$19.5206	$4.88
		2/20/91	0.50 hrs	$19.5206	$9.76
		2/25/91	0.25 hrs	$19.5206	$4.88
		3/25/91	0.25 hrs	$19.5206	$4.88
		5/13/91	0.25 hrs	$19.5206	$4.88
		5/15/91	0.25 hrs	$19.5206	$4.88
		5/28/91	0.25 hrs	$19.5206	$4.88
		5/29/91	0.25 hrs	$19.5206	$4.88
		6/17/91	0.50 hrs	$19.5206	$9.76
		7/01/91	0.50	$19.5206	$9.76
				TOTAL =	$73.20
FRANKS, MARILYN			MENTAL HEALTH	SW II	E
[ ]		7/9, 16/91	1.25 hrs	$12.4562	$15.57

	8/5, 6/91	1.50 hrs	$12.4562	$18.68
				.....
			TOTAL =	$34.25
GROVES, ROY		OFF OF PLANNING	DIR PLANNING IMP	E
[ ]	4/04/91	4.00 hrs	$34.7933	$139.17
	4/11/91	4.00 hrs	$34.7933	$139.17
				.....
			TOTAL =	$278.35
HAMMOND, LYNDA		MENTAL HEALTH	SW II	E
[ ]	1/18/91	0.50 hrs	$14.1464	$7.07
	3/01/91	0.50 hrs	$14/1464	$7.07
	3/10/91	1.25 hrs	$14.1464	$17.68
	4/04/91	0.50 hrs	$14.1464	$7.07
	4/22, 25/91	2.00 hrs	$14.1464	$28.29
	5/06/91	0.50 hrs	$14.8626	$7.43
	5/10/91	0.50 hrs	$14.8626	$7.43
	5/13, 16, 20. 24/91	2.50 hrs	$14.8626	$37.16
	5/24, 25, 31/91	1.75 hrs	$14.8626	$26.01
				.....
			TOTAL =	$145.22
HUDSON, MARY		MENTAL HEALTH	SW II	E
[ ]	6/26/91	3.25 hrs	$14.1464	$45.98
	8/02/91	1.75 hrs	$14.1464	$24.76
				.....
			TOTAL =	$70.73
KITCHENS, CHRISTINE		LIBRARIES	LIBRARIAN V	E
[ ]	4/10/91	2.00 hrs	$20.4605	$40.96
				.....
			TOTAL =	$40.96

PEASE, BIRNEY		PUBLIC WKS-BOND PROG.	DIR PW BOND PROG	E
[ ]	5/14/91	1.00 hrs	$33.1548	$33.15
			TOTAL =	$33.15
POCOCK, LEONARD		OFF MGT SERVICES	AUDITOR IV	E
[ ]	4/19/91	0.25 hrs	$22.5976	$5.65
	5/09/91	0.50 hrs	$22.5976	$11.30
	5/21/91	0.25 hrs	$22.5976	$5.65
	6/03/91	0.50 hrs	$22.5976	$11.30
	6/17/91	0.50 hrs	$22.5976	$11.30
	8/12/91	0.25 hrs	$22.5976	$5.65
	9/04/91	0.25 hrs	$22.5976	$5.65
			TOTAL =	$56.49
ROSS, STUART		OFF MGT SERVICES	AUDITOR I	E
[ ]	1/31/91	0.50 hrs	$13.4403	$6.72
			TOTAL =	$6.72
SALLET, SUSAN		AVIATION	SPC III	E
[ ]	PPE 8/17/91	2.00 hrs	$14.2380	$28.48
	8/19/91	3.00 hrs	$14.2380	$42.71
			TOTAL =	$71.19
SWIFLET, JACQUELINE		ALCOHOL/DRUG	SAS II	E
[ ]	6/14/91	2.00 hrs.	$9.2880	$18.56
			TOTAL =	$18.56

SIMPSON, KATHLEEN		OIT	ENGINEER II	E
[ ]	4-8 - 12/91	20.00 hrs	$17.1645	$343.29
	4/16/91	4.00 hrs	$17.1645	$68.66
	4/18/96	4.00 hrs	$17.1645	$68.66
	5/17/91	3.00 hrs	$17.1645	$51.49
	5/22/91	1.00 hrs	$17.1645	$17.16
	5/31/91	1.00 hrs	$17.1645	$17.16
			TOTAL =	$566.43

SOLA, ARTURA		MENTAL HEALTH	SW II	E
[ ]	1/09/91	0.50 hrs	$12.4562	$6.23
	1/17/91	1.00 hrs	$12.4562	$12.46
	2/05/91	0.50 hrs	$12.4562	$5.23
	2/11/91	0.50 hrs	$12.4562	$6.23
	2/18/91	1.00 hrs	$12.4562	$12.46
	3/01/91	0.50 hrs	$12.4562	$6.23
	3/06/91	0.50 hrs	$12.4562	$6.23
	4/01/91	0.50 hrs	$12.4562	$6.23
	4/2, 8, 9/91	2.00 hrs	$13.0865	$25.17
	6/26/91	0.50 hrs	$13.0865	$6.54
	8/05/91	2.00 hrs	$13.0865	$26.17
	8/27/91	1.00 hrs	$13.0865	$13.09
			TOTAL =	$134.26

TORAK, CHERRY		PRIMARY HEALTH	ACCR REC SPV	E
	1/30/91	4.00 hrs	$14.8356	$59.34
			TOTAL	$59.34

VESHINSKI, SLOANE		MENTAL HEALTH	SW II	E
[ ]	4/15/96	3.50 hrs	$11.5667	$40.48
	7/02/91	0.75 hrs	$11.5667	$8.68
				$49.16
		TOTAL AMOUNT DUE		$2,052.79

PAY STUBS OF PLAINTIFF, PATRICIA RAGLIN

BEST AVAIL

BLE COPY

D-O-S	EMPLOYEE NAME	SOC SEC NO		CHECK NUMBER	PAY ENDING
250901	PATRICIA N RAGLIN	[redacted]		1457	[redacted]

PAY RATE	PERIOD	TOTAL HOURS	GROSS PAY	TOTAL TAXES	VOLUNTARY DEDUCTIONS	NET PAY
9.0579	013	80.00	724.63	157.11	21.51	581.21

MISCELLANEOUS		EARNINGS	HOURS	AMOUNT	TAXES & DEDUCT	CURRENT	YEAR TO DATE
YTD GRS	3,976.40	REGULAR	79.00	715.57	FICA US	54.42	298.63
		SICK LEAVE	1.00	9.06	U S W/H TX	102.69	560.45
		MILEAGE	.00	35.20	GROUP HLTH	12.78	51.12
STD HRS	80.00				ORAL-ONE	7.15	28.60
SICK HRS	11.26				DISABILITY	1.58	13.67
VAC. HRS	16.90						

BOARD OF COUNTY COMMISSIONERS
BROWARD COUNTY
FORT LAUDERDALE, FLORIDA

148-A

D-O-S	EMPLOYEE NAME	SOC. SEC. NO		CHECK NUMBER	PAY ENDING
250901	PATRICIA N RAGLIN	[redacted]		0050163	04/30/86

PAY RATE	PERIOD	TOTAL HOURS	GROSS PAY	TOTAL TAXES	VOLUNTARY DEDUCTIONS	NET PAY
9.0579	010	79.00	715.67	155.06	21.63	538.86

MISCELLANEOUS		EARNINGS	HOURS	AMOUNT	TAXES & DEDUCT	CURRENT	YEAR TO DATE
YTD GRS	1,802.51	REGULAR	74.00	670.28	FICA US	53.74	135.37
		SICK LEAVE	5.00	45.29	U S W/H TX	101.34	252.36
					GROUP HLTH	12.76	12.78
STD HRS	80.00				ORAL-ONE	7.15	7.15
SICK HRS	4.19				DISABILITY	1.70	1.70
VAC. HRS	7.66						

BOARD OF COUNTY COMMISSIONERS
BROWARD COUNTY
FORT LAUDERDALE, FLORIDA

O-O-S	EMPLOYEE NAME	SOC. SEC. NO.		CHECK NUMBER	PAY ENDING
250901	PATRICIA N RAGLIN	[redacted]		00862J1	08/20/88

PAY RATE	PERIOD	TOTAL HOURS	GROSS PAY	TOTAL TAXES	VOLUNTARY DEDUCTIONS	NET PAY
9.0579	018	79.00	715.57	155.08	21.62	399.07

MISCELLANEOUS	EARNINGS	HOURS	AMOUNT	TAXES & DEDUCT	CURRENT	YEAR TO DATE
YTD GRS 7,590.49	REGULAR	40.00	362.31	FICA US	53.74	570.05
	SICK LEAVE	10.00	90.58	U S W/H TX	101.34	1,072.58
	VACATION	29.00	262.68	GROUP HLTH	12.76	115.02
STD HRS 80.00	MILEAGE	.00	60.20	ORAL-ONE	7.15	64.35
SICK HRS 5.67				DISABILITY	1.69	15.23
VAC. HRS 3.26						

BOARD OF COUNTY COMMISSIONERS
BROWARD COUNTY
FORT LAUDERDALE, FLORIDA

O-O-S	EMPLOYEE NAME	SOC. SEC. NO.		CHECK NUMBER	PAY ENDING
250901	PATRICIA N RAGLIN	[redacted]		0121396	11/26/88

PAY RATE	PERIOD	TOTAL HOURS	GROSS PAY	TOTAL TAXES	VOLUNTARY DEDUCTIONS	NET PAY
9.3744	625	77.00	721.67	156.49	41.62	523.76

MISCELLANEOUS	EARNINGS	HOURS	AMOUNT	TAXES & DEDUCT	CURRENT	YEAR TO DATE
YTD GRS12,736.22	REGULAR	56.00	525.00	FICA US	54.21	958.48
	VACATION	21.00	196.67	U S W/H TX	102.26	1,811.16
				GROUP HLTH	12.76	204.48
STD HRS 80.00				ORAL-ONE	7.15	114.40
SICK HRS 20.30				DISABILITY	1.69	27.08
VAC. HRS 3.70				CREDIT UN	20.00	.00

TAX FREE BONDS CALL 1-636-5550

BOARD OF COUNTY COMMISSIONERS
BROWARD COUNTY
FORT LAUDERDALE, FLORIDA

[BROWARD COUNTY]

MEMORANDUM

TO: L.A. Hester
County Administrator

THRU: Phillip C. Allen, Director
Finance & Administrative Services Department

FROM: Phil Rosenberg, Director
Personnel Division

DATE: February 4, 1991

SUBJECT: Amending Payroll Procedure for Exempt Employees

Employers all around the country now have an additional burden to meet in order to sustain exempting employees from the provisions of the Fair Labor Standards Act. FLSA requires basically that cash overtime be paid at the rate of time and a half for all work in excess of 40 hours in a consecutive, seven-day work period. There are several exemptions available to employers, and many are commonly used in government. For example, an exemption is available that allows firefighter or police officer work periods to be longer than seven days. There are also exemptions for "executive, administrative, and professional employees." There are a variety of "tests" which are supposed to guide employers in determining exemptions. In Broward County, there are currently approximately 900 persons meeting the executive, administrative, or professional employee exemption requirements.

As a result of a Federal Appeals Court decision, an additional burden is now present. The U.S. Supreme Court has now denied a review of the case and, as a result, we are now subject to the same substantial liabilities affecting many other states, cities, and counties. If we await a legal determination directly applicable to us, we will be unnecessarily increasing our ultimate liability.

The "Abshire vs. Kern County" case held that, even though all other tests for exemptions were met, an employee will not be considered an executive (or, for that matter, an administrator or a professional) under FLSA if their pay is "docked" for absences of less than one day. The court's reasoning was that persons such as executives must truly be "salaried," rather than "hourly" employees to be exempt. If an agency's payroll practices are so restrictive as to dock the pay of such employees for one or two hours, for example, then it follows, under the court's reasoning, that these individuals do not qualify to be considered as executives.

The court is, in effect, suggesting that such exempt employees must be paid on a "payroll by exception" basis. That is, for payroll purposes an assumption would be made that exempt persons are automatically present and working at least the minimum 37 - 1/2 hours a week. This assumption would only be controverted when the employee uses sick leave, annual leave, or some other formally accrued leave time. Short-term absences, defined as under one day, would not be reflected in entries into the payroll records. Rather, management of the exempt person's time would be based upon work rules enforced by department and division directors, rather than by docking individuals one or two hours, for example, for short-term absences.

The point is that some new rules need to be drafted which allow us to ensure, for internal management purposes, that exempt persons work

full time, but that flexibility in scheduling is present so that docking pay for short-term absences in the payroll system is avoided.

I have been involved in the administration of the Fair Labor Standards Act since the mid-1970's. The law was created in the Depression for "full employment" and abuse correction purposes in private industry. It is out of place in its applicability to public administration. Yet, we are "stuck with it" and, until Congress acts to limit FLSA's applicability to government, we are bound by court decisions, even though they may be based upon bad sets of facts. There currently are efforts underway by NACO and other public interest groups to clarify the existing "law." To minimize our liability resulting from this major court decision, I suggest that we prepare amendments to our payroll practices concerning exempt employees as rapidly as possible and that these policies include a switch to a "payroll by exception." Evan Lukic and I should take the lead roles in making these procedural changes. Thereafter, we should meet with all division and department directors and explain the background of the needed changes and implement them.

If you concur with the payroll by exception concept, we will begin work immediately to implement the necessary changes and keep you advised.

PR/cb

(flsa)

Attachment

[BROWARD COUNTY]

March 4, 1991

Our File: 91-026

MEMORANDUM

TO: Phil Rosenberg, Director
Personnel Division

FROM: Rebecca L. Kay, Assistant County Attorney

RE: Amending Payroll Procedure for Exempt Employees

At your request dated February 21, 1991, I have reviewed your memo to the County Administrator on the above subject. I concur with your interpretation of the case, *Abshire v. County of Kern*, 908 F. 2d 483 (9th Cir. 1990), and that it is just a matter of time before the Eleventh Circuit rules the same way. Furthermore, the Ninth Circuit's footnote 3 suggest that a court might reasonably conclude that "even if deductions were required only from fringe benefits such as leave time, and not from base pay, the affected employees would still not qualify as 'salaried'". id.

If you require legal assistance in drafting appropriate procedures, please contact me.

RLK:wp

[Morgan, Lewis & Bockius]
Miami, Florida

August 8, 1991

CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION --
NOT SUBJECT TO PUBLIC DISCLOSURE PURSUANT TO
F.S. § 119.07 (3) (o)

Phillip Rosenberg, Director
Personnel Division
Broward County
115 South Andrews Avenue, Room 508
Fort Lauderdale, Florida 33301

Re: Kuchinskas vs. Broward County

Dear Phil:

You have asked us to examine the County's compensation policies as they relate to the allegations in the above-referenced litigation challenging the salaried status of "job basis" employees, and recommend changes, if any, that would enhance the county's defenses and ensure compliance with the Fair Labor Standards Act ("FLSA").

As you may know, the complaint in the above-styled action alleges that certain job basis employees are governed by County policies and practices which subject them to deductions in their compensation for periods of absence of less than a full day. The plaintiffs claim that because of these policies and practices the requirements of the "salary basis" regulation set forth in 29 C.F.R. §

541.118 are not met, and, therefore, these employees are not exempt from the overtime provisions of the FLSA.

In the answer to the complaint we filed last week (copy attached), you will note that the County has denied the plaintiff's allegation that job basis employees are subject to deductions for absences of less than a day. The basis of the County's denial is simply that the policies and practices actually in effect have not to any significant extent caused deductions in compensation of these employees for period of absence of less than a day, despite the existence of some written policies which could be interpreted to permit such deductions. See *Atlanta Professional Firefighters Union v. City of Atlanta*, 920 F. 2d 800 (11th Cir. 1991).[1] Moreover, as an affirmative defense, the County asserted that deductions which may have been made inadvertently or for reasons other than lack of work are being corrected. This is the so-called "window of correction" defense provided for in 29 C.F.R. § 541.118 (c) (6). [sic] Based on the defenses the County has raised and our review of the County's policies,[2] we recommend that several measures be taken in the near term.

---

[1] We may also argue that, pursuant to County Ordinance 90-27, the civil Service Rules do not apply to employees we have treated as exempt from the FLSA.

[2] At present, the county's written policies which affect compensation are found in Chapter 14 of the Civil Service Rules and Regulations. Procedures to implement these policies are contained in an accounting procedures manual. Prior to September 21, 1990, Chapter 27 of the Broward County Code addressed some issues related to compensation, but that Chapter has been amended and no longer contains any specific policies relating to compensation.

First, the Civil Service Rules and Regulations should be amended to clarify that partial day absences for salaried employees will not result in a reduction in compensation. In addition to providing an explicit statement to that effect, several other specific rules should be modified. The tardiness penalty found at Rule 14.224 should not be applied to salaried employees, and that should be made explicit. The policy concerning sick leave, Rule 14.229 (j), should state that once a salaried employee has exhausted all sick leave and other forms of paid leave, that employee will still be paid for absences of less than a day for sickness. Rule 14.239 regarding absence without leave should be changed to provide that absence without leave for part of a day for salaried employees will not result in loss of pay for that day, but may still subject the salaried employee to disciplinary action. Finally, rules which refer to hours of work should be reviewed and changed if they can be interpreted as indicia that salaried employees' pay is sometimes measured on an hourly basis. For example, Rule 14.227 (d) regarding holidays uses "the number of hours [employees] normally work each day" as the basis for computing holiday pay. This should be changed to a daily rate or 1/5th of a weekly rate for salaried employees.

The law is unsettled as to whether deductions from leave banks to cover absences of less than a day jeopardizes salaried status. In *Abshire v. Kern County*, 908 F. 2d 483 (9th Cir. 1990), the court suggested in a footnote that even if deductions were required only from fringe benefits such as leave time, and not from base pay, the employees still might not qualify as salaried. We believe the better reasoned authority on this issue is the Department of Labor's 1989 opinion letter which stated that "an employer can require an employee to substitute paid leave for [less than a full day] absences without losing the exemption for that week." We recommend that you continue to deduct from leave banks, so long as when those banks are exhausted, salaried employees would still be compensated for absences of less than a day.

Second, to take advantage of the "window of correction," found at 29 U.S.C. § 541.118 (a) (6), we need to assess the extent to which job basis employees have had deductions from their pay for absences of less than a day. If we find that any such deductions have occurred, we should then compensate these employees for these deductions and promise to comply with the FLSA in the future. If we find that efforts to locate such individuals may not be feasible, we may consider drafting a memorandum to job basis employees asking anyone who has had a deduction for a period of less than a day to present evidence thereof so that payment can be made.

Of course, we will be in contact with you soon regarding these issues. In the meantime, if you have any questions or comments, please do not hesitate to contact us.

Sincerely,

/s/
Michael G. Whelan

MGW/dl
cc: John J. Copelan, Jr.
Peter J. Hurtgen

[BROWARD COUNTY]
MEMORANDUM

TO: All Department/Division/Office Directors

THRU: B. Jack Osterholt
County Administrator

Phillip C. Allen, Director
Finance & Administrative Services Department

FROM: Phil Rosenberg, Director
Personnel Division

DATE: March 5, 1992

SUBJECT: Guidelines for Open Range Employee Payroll Management

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On February 28, 1992 it was announced that time sheets would no longer be required for Open Range employees. The Open Range employees, typically key managers and professionals, are paid to do a job, rather than to work only a certain limited schedule. This memorandum will provide guidelines for Directors to follow in balancing the importance of accountability with the important need for flexibility associated with this group of employees.

Be guided by two factors --- individual responsibility for work habits and common sense operating rules. Individual responsibility to perform effectively and to work at least the minimum of a regular 37 1/2 hour work week are expected of each Open Range employee. You must be satisfied as a Director that the Open Range employees working

under your supervision are meeting their personal responsibility to perform effectively. If this effectiveness is in doubt, you are invited to contact Personnel to develop a corrective action plan and, if necessary, consider appropriate disciplinary action.

A question was recently asked as to whether any absence whatsoever, regardless of the length of time, during a work day must be accounted for on a leave of absence request form. Remember that the purpose of not requiring time sheets for Open Range employees is to recognize their executive role in the organization and not to require, in effect, that a time clock be utilized to account for all of their time every day. As a general guideline, you should establish a procedure in your operation so that all absences of more than two hours in a day would be reflected on the pay voucher and charged against accrued leave such as sick leave, annual leave, job basis leave, sick leave bonus day, etc. Occasional absences of less than two hours occasionally would not be reflected on the voucher if you are satisfied that the Open Range employee has otherwise worked beyond your minimum expectations. As a Director, you may also require that you be made aware of or approve any absences regardless of duration, especially in cases where an individual's performance is of concern. If you have any questions, you are welcome to contact Personnel. In summary...

	Open Range Employee	**Other Employees Exempt From FLSA**
Are Time Sheets Required?	No-May be used at the discretion of individual Directors.	Yes - Continue Existing Practice
Is a Leave Request Form (BC 102-112) Required?	Yes - For absences of more than 2 hrs	Yes - Continue Existing Practice

in a day.

Will Pay Be Docked for Absences of Less Than a Day With No Paid Leave?	No.	No.

PR/cb
(flsa92)

cc: Evan Lukic

[BROWARD COUNTY]
MEMORANDUM

TO: All Department/Division/Office Directors

THRU: B. Jack Osterholt
County Administrator

Phillip C. Allen, Director
Finance & Administrative Services Department

FROM: Phil Rosenberg, Director
Personnel Division

DATE: March 19, 1992

SUBJECT: GUIDELINES FOR EXEMPT EMPLOYEE PAYROLL MANAGEMENT

Here are answers to the most commonly asked questions on how to manage payroll for employees exempt from the overtime provisions of the Fair Labor Standards Act (FLSA). This memorandum follows a policy change in late February, 1992 under which time sheets would no longer be required for Open Range employees.

1. WHO IS EXEMPT FROM FLSA? The law and its accompanying regulations generally recognize three categories of employees considered exempt from the overtime provisions of FLSA. The categories are "executive, administrative, and professional" employees paid on a salaried basis. In Broward County, this includes all Open Range employees as well as a variety of others. Each Classification Description shows the FLSA status near the end of the document.

2. WHAT DOES FLSA OVERTIME EXEMPTION MEAN? Exempt employees are paid to do a job rather than to work only a certain fixed schedule. They receive a regular salary rather than being paid for a varying number of hours such as laborers or "piece workers". Exempt employees are not eligible for time and one half pay for work over forty hours in a week. Likewise, their salaries will not be docked for absences of less than a day. In short, they are professionals and managers expected to "get the job done" and meet the higher level of responsibility and trust that comes with their jobs.

3. ARE TIME SHEETS STILL REQUIRED FOR EXEMPT EMPLOYEES OTHER THAN THOSE IN THE OPEN RANGE PAY PLAN? Time sheets continue to be required for all employees, exempt and non-exempt - other than Open Range employees. Continue current payroll practices for employees other than those in the Open Range Pay Plan with only one exception. The exception is that salaries for any exempt employees will not be docked for absences of less than one day. SEE QUESTION #6 below.

4. IS AN EXEMPT OPEN RANGE EMPLOYEE STILL ACCOUNTABLE FOR WORK TIME AND WORK PERFORMANCE? All employees are accountable to perform satisfactory work, consistent with County policy and rules. However, Open Range employees are especially accountable to their Directors to perform their work with professional competence and "to get the job done" effectively. Even though time sheets are no longer required for payroll processing purposes, Directors have the option to require time sheets, calendars, or other similar tools to be satisfied that necessary work is being performed. Directors may require advance approval for absences. However, requests to be absent from work with or without pay, and regardless of the length of the absence, can be denied by directors based on operational need or individual performance concerns. Remember, however, that even unauthorized absences of

less than a day for exempt employees will not result in their salaries being docked. Disciplinary action may follow, however. Directors are also obligated to take effective disciplinary action in cases of performance or attendance abuse. Exempt employees have an obligation to fulfill their work obligations responsibly and accountably.

5. WITHOUT A TIME SHEET, HOW WILL PAYROLL BE MANAGED FOR OPEN RANGE EMPLOYEES? The payroll system is programmed to continue regular salary payments for Open Range employees. Any use of accrued leave time including sick leave, annual leave, personal days, sick leave bonus days and job basis leave is to be reflected on a Leave Request Form (BC 102-112). The payroll voucher would then reflect the use of that accrued leave. Absences of less than one day need not be reflected on a BC 102-112 if Directors are satisfied that the employee is performing effectively and that no abuse is occurring. The time sheet policy change is a reflection of trust in the County's executives to use common sense and responsible professional conduct in their attendance and performance.

6. WILL EXEMPT EMPLOYEE SALARIES BE DOCKED FOR ABSENCES OF LESS THAN A DAY? Exempt employees are "salaried" as opposed to being paid for "piece work" or paid only hourly. Even though the automated payroll system uses hourly rate information in its calculations, the concept here is that the regular salary of an exempt employee is continued even if there is an absence of less than one day and no leave time is used. This is true even if the absence for less than a day was unauthorized. Salaries for unauthorized absences of a full day or days, however, can be docked. Any unauthorized absences of one day or less than one day can be grounds for disciplinary actions including reprimand or suspension. In any such unusual circumstances, consult with Personnel.

7. WHO IS RESPONSIBLE FOR PROPER TIME ACCOUNTABILITY FOR EXEMPT EMPLOYEES? Two parties share in direct responsibility and accountability. First, all exempt employees are responsible for conducting themselves in keeping with the highest personal standards of performance and ethical conduct in representing the County. Second, Directors are responsible and accountable for the effectiveness of their operations. They must be satisfied with the performance and professional conduct of their subordinates, including attendance.

Should you have questions or require additional clarification, please contact Alison Sands at 357-6439.
PR/cb
(flsaex)